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The Role of Corporate Governance in Curbing Foreign Corrupt Business Practices

Poonam Puri

Osgoode Hall Law School of York University, ppuri@osgoode.yorku.ca

Andrew Nichol

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Abstract

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Keywords

Corporate governance; Corruption--Law and legislation; Canada

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The Role of Corporate Governance in Curbing Foreign Corrupt Business Practices

POONAM PURI* & ANDREW NICHOL**†

The role of corporate and securities laws in addressing foreign corrupt business practices have, to date, received limited consideration. Departing from the substantial literature on the criminal and public law response to international corruption, the authors analyze Canada's *Corruption of Foreign Public Officials Act* in comparison with British and American legislation and conclude that the Canadian regime relies too heavily on the use of criminal sanctions and fails to contemplate the role of behaviour modification in its legislative structure. Recognizing that multinational corporations are well placed to identify, expose, and prevent corrupt business practices, the authors propose a private law-based solution that builds upon the existing corporate governance frameworks of multinational corporations to curtail corruption. Corporate law directors' duties and securities law disclosure requirements provide legislators with complimentary tools to incentivize the development of internal control mechanisms and facilitate civil claims against corrupt companies.

On s'est jusqu'ici peu préoccupé du rôle des lois sur les entreprises et les valeurs mobilières dans la résolution de la corruption des pratiques commerciales à l'étranger. S'écartant de la

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* LL.B. (University of Toronto), LL.M. (Harvard). Professor of Law at Osgoode Hall Law School, York University.

** B.A. (University of Manitoba), J.D. (Osgoode Hall Law School). Associate at Shea Nerland LLP, andrewnichol@osgoode.yorku.ca.

Any questions, comments, or concerns may be directed to ppuri@osgoode.yorku.ca or anichol@snclaw.com. We would like to thank and acknowledge Alexandra Allison for her excellent research assistance.

documentation substantielle qui traite de la réaction du droit criminel et public à la corruption internationale, les auteurs comparent la *Loi canadienne sur la corruption d'agents publics étrangers* aux lois britanniques et américaines et concluent que la loi canadienne repose trop fortement sur le recours aux sanctions criminelles et néglige de considérer le rôle des modifications du comportement. Reconnaisant que les entreprises multinationales sont bien placées pour identifier, dénoncer et prévenir les pratiques commerciales corrompues, les auteurs proposent une solution fondée sur le droit privé et découlant du cadre actuel de la gouvernance des entreprises multinationales pour endiguer la corruption. Le devoir des administrateurs des lois sur les sociétés et les exigences de divulgation des lois sur les valeurs mobilières donnent aux législateurs des outils supplémentaires pour motiver le développement de mécanismes internes de contrôle et faciliter les poursuites civiles à l'encontre des entreprises corrompues.

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IN RECENT YEARS, DOMESTIC AND INTERNATIONAL ACTORS have become increasingly attentive to the social and political effects of foreign corrupt practices.¹ Corrupt payments made to foreign public officials harm the recipient state's socio-political environment by undermining the legitimacy of the rule of law and fortifying the position of a bureaucratic elite.² In doing so, corruption impedes the growth of domestic markets by distorting competition and imposing inefficient and unaccountable rents on international commerce. As a result, corruption presents a threat to long-term development and may cultivate economic instability, which ultimately undermines the incentive for multinational corporations to invest and operate in affected jurisdictions.

This article approaches corruption from a law-and-economics perspective, that is, as a phenomenon that can be understood through the concept of supply and demand. Due to jurisdictional limitations, the domestic regulation of foreign corrupt practices is generally limited to regulating the conduct of the party supplying the bribe. The state actor demanding the bribe is generally beyond the reach of Canadian officials. Recognizing the limits associated with regulating only one side of a corrupt transaction, this article focuses on mechanisms that aim to reduce the supply of such payments. Based on an analysis of existing hard-law mechanisms, including provisions of the *Criminal Code* and the Canadian *Corruption of Foreign Public Officials Act* ("CFPOA"), this article proposes a broader model for the regulation of foreign corrupt practices. The model combines existing hard-law measures with soft-law corporate and securities regulatory structures designed to induce enterprise-wide compliance and attitudinal shifts among market participants. In doing so, this model frames the payment of bribes to foreign public officials as a matter not only of criminal law but also of corporate compliance. It recognizes that effective anti-corruption strategies require cooperation both from the individuals able to provide illegal

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1. See OECD, Working Group on Bribery in International Business Transactions, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1997), online: <http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf>; United Nations Convention against Corruption, 31 October 2003, GA Res 58/4, UNGAOR, 58th Sess, Supp No 49; OECD, Working Group on Bribery in International Business Transactions, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (26 November 2009), online: <<http://www.oecd.org/daf/anti-bribery/44176910.pdf>> [OECD, 2009 Recommendation].
 2. See Toke S Aidt, "Corruption, Institutions, and Economic Development" (2009) 25:2 Oxford Rev Econ Pol 271; John Brademas & Fritz Heimann, "Tackling International Corruption: No Longer Taboo" (1998) 77:5 Foreign Affairs 17 at 18.

payments and from the more senior corporate officials able to set organizational culture and manage risk.

Criminal enforcement of the *CFPOA* faces significant jurisdictional and practical limitations. In particular, given that the offending conduct of providing payments to foreign public officials is likely to occur outside Canada's territorial jurisdiction, domestic law enforcement officials are limited in their ability to detect, investigate, and prosecute international corruption. When corruption is detected abroad, Canadian officials only have jurisdiction to prosecute Canadian citizens or residents involved in the transaction.³ Recognizing the limitations of domestic enforcement of foreign corrupt practices and the difficulties inherent in developing a truly transnational regulatory framework, we recommend the development of a more comprehensive regulatory structure to prevent Canadian involvement in corruption abroad. Focusing on corruption from a corporate compliance perspective, we suggest that incorporating legal instruments such as directors' fiduciary duties and disclosure obligations, which are well understood regulatory tools in corporate and securities law, will help promote a culture of compliance within Canadian corporations. These tools will encourage companies to develop internal control mechanisms to prevent corruption and will help to balance enforcement costs between market participants and government regulators and to facilitate a bottom-up approach to addressing foreign corruption by Canadian corporations. In sum, this article provides a novel analysis that synthesizes principles of economics and corporate governance to provide fresh insights into supply-side regulatory models in the context of white-collar crime enforcement.

The article proceeds as follows. In Part I, we provide an overview of the regulation of corruption by discussing the theoretical basis for regulating the conduct of corporations operating abroad. We also compare the *CFPOA* to legislation aimed at domestic corruption and analyze the jurisdictional and geopolitical limits on Canada's ability to prosecute both the supply of and demand for bribes. In Part I, we also compare the *CFPOA* to the United States' *Foreign Corrupt Practices Act* ("FCPA")⁴ and the United Kingdom's *Bribery Act* ("UK Bribery Act").⁵ This comparison highlights the role of compliance-based regulatory structures in curbing corruption. Then, in Part II, we evaluate the enforcement framework for the *CFPOA* and provide an analysis of existing *CFPOA* jurisprudence. Our analysis highlights the need both for greater enforcement

3. *Chowdhury v Canada*, 2014 ONSC 2635, [2014] OJ No 2004 [Chowdhury].

4. 15 USC §§ 78dd-1 et seq (1977).

5. Bribery Act 2010 (UK), c 23 [UK Bribery Act].

intensity and for clearer guidance for law enforcement, prosecutors, and judicial officials in Canada who investigate, prosecute, and sanction corrupt conduct. Part III presents a series of proposals designed to strengthen the effectiveness of the *CFPOA* through the use of corporate law fiduciary duties and securities law disclosure requirements, which are designed to enhance compliance and promote a culture of compliance within these organizations. Part IV concludes.

I. REGULATING CORRUPTION

The transaction underpinning the provision of a bribe can be understood through basic economic principles of supply and demand. Regulating such a transaction can shift the economics of the bargain by altering the risk-weighted costs and benefits to each party. Inconsistent regulation of the supply and demand sides of corrupt transactions presents challenges for the regulation of foreign corrupt practices and highlights the limitations of hard-law criminal enforcement mechanisms in these circumstances. This Part evaluates existing regulatory structures in Canada that address both foreign corrupt practices and corruption in the domestic context, and compares them with foreign corrupt practices legislation in the United States and United Kingdom.

A. THEORY ON THE REGULATION OF FOREIGN CORRUPTION PRACTICES

Global development and the efficient allocation of social resources depend on free and fair competition among independent actors. To this end, government intervention through regulation, procurement, or licensing should be based on the relative merits or qualifications of the relevant actors rather than extraneous factors that might skew the decision-making process. When an economy falls victim to rampant corruption, market-based competition may be distorted and systemic barriers may be imposed on the ability of new participants to grow their market share.⁶

This section evaluates the basis for criminalizing the payment of bribes to foreign public officials by considering the economic justifications for countries to regulate the conduct of their companies operating abroad. Based on a review of this literature, we observe that there are compelling economic justifications for developed states to regulate the ability of their companies and nationals to bribe foreign public officials. First, this section reviews the impact of corruption from

6. See generally Susan Rose-Ackerman, "The Political Economy of Corruption" in Kimberly Ann Elliott, ed, *Corruption and the Global Economy* (Washington: Institute for International Economics, 1997) 31 at 32-46.

the perspective of the investor state by considering the impact of corruption on political stability. This section then considers the impact of corruption on the economic efficiency and growth of the recipient state.

1. A SUPPLY-SIDE ECONOMIC ARGUMENT FOR REGULATING FOREIGN CORRUPTION

Corruption, through the payment of bribes to public officials, has the effect of distorting markets in recipient states.⁷ These payments not only interfere with competition among corporations that deal with governments but also fortify the position of bureaucratic elites, thereby creating barriers to social mobility and misallocating social resources to an established, corrupt group.⁸ Corruption presents a threat to the long-term development of these countries and may create economic instability, which ultimately undermines the opportunity and incentive for multinational companies to operate in a jurisdiction.⁹

Perspectives on what constitute objectionable business practices may differ among countries and cultures. Thus, the decision to criminalize certain practices on an extraterritorial basis may, in some respects, be regarded as an arbitrary ethical decision that limits the freedom of corporations operating abroad and places them at a competitive disadvantage relative to domestic corporations.¹⁰ However, the criminalization of corrupt payments to foreign public officials may also be understood from an economic perspective, according to which extraterritorial anti-corruption legislation facilitates democratic transitions and opens up new markets for businesses looking to expand their operations or distribute their products to new jurisdictions.

Although corruption has been correlated with high short-run growth in certain emerging economies such as Indonesia and South Korea, it also has the

7. Brademas & Heimann, *supra* note 2 at 18.

8. Aidt, *supra* note 2 at 288.

9. Critics of anti-corruption legislation suggest laws such as the Canadian *CFPOA* export moral standards, which may not be commonplace in other jurisdictions. See generally Lisa Harriman Randall, "Multilateralization of the Foreign Corrupt Practices Act" (1997) 6 Minn J Global Trade 657 at 673. The arguments of these critics, in turn, assert that foreign corrupt practices legislation is the product of legal positivism. Emerging during the Cold War and resurfaced following the collapse of the Soviet Union when the western world attempted to introduce democracy and promote the rule of law into the developing world. See Philip M Nichols, "Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling Transnational Bribery" (1999) 20 Mich J Int'l L 451 at 454-59.

10. See SC 1998, c 34, s 3(3)(a) [*CFPOA*]. Note that the Canadian *CFPOA* does create a saving provision where conduct is permitted under the laws of the foreign state.

effect of impeding the development of market-based economies, since decisions are more likely to be based on non-economic factors.¹¹ When rent-seeking behaviour drives decision making, competition is stymied, monopolistic behaviour is fostered and perpetuated, and the primacy of the rule of law is compromised. Thus, corruption undermines the basic conditions necessary for effective and orderly market-based competition.¹²

This disintegration of political and economic institutions occurs because contracts are awarded as a result of bribes rather than superior price or product qualities. Furthermore, the enforceability of agreements between a corrupt government and foreign businesses is also diminished because each party has an incentive to conceal the bribe and, by extension, the basis on which the contract was awarded. Consequently, there are reduced incentives for the parties to the contract to vociferously enforce its terms.¹³ A second systemic failure emanating from corruption is that corruption creates incentives for corrupt public officials to remain in a country's bureaucracy. Since corruption skews the incentive structure within the bureaucracy, there is a tendency for civil servants who are not corrupt to leave the workforce, thereby perpetuating and magnifying the prevalence and effects of the corruption.¹⁴ Thus, as corruption becomes increasingly pervasive, the economic orientation of the impugned country shifts from one that is market based to one that supports and facilitates the payment of bribes.

The powerful, short-run incentives that exist for corporations to engage in corrupt business practices may give rise to a scenario where the companies benefiting from corruption are unlikely to forego these windfalls voluntarily in order to promote the development of a more stable economic and political system. The economic incentives to maintain these payments are particularly pronounced because if the company providing the bribes ceases to make the payments, other competitors are free to capture the market share acquired and maintained through the use of these bribes. Consequently, solutions that regulate the conduct of all suppliers, irrespective of jurisdiction, ensure that corporations

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11. Nichols, *supra* note 9 at 463; Brademas & Heimann, *supra* note 2 at 18; Robert D Tronnes, "Ensuring Uniformity in the Implementation of the 1997 OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions" (2000) 33 Geo Wash Int'l L Rev 97 at 103-05.
 12. Eleanor RE O'Higgins, "Corruption, Underdevelopment, and Extractive Resource Industries: Addressing the Vicious Cycle" (2006) 16:2 Bus Ethics Q 235 at 238-39.
 13. Nichols, *supra* note 9 at 464.
 14. Omotunde EG Johnson, "An Economic Analysis of Corrupt Government, With Special Application to Less Developed Countries" (1975) 28:1 Kyklos 47 at 57.

wishing to engage in non-corrupt business are not required to cede market share to competitors domiciled in another country.

International cooperation to prohibit corrupt practices by businesses operating in foreign markets serves an important role in enabling a host jurisdiction to achieve stable, sustainable long-run growth. “Institutional piggybacking” can occur where global anti-corruption norms are enforced in jurisdictions other than where the corruption occurred, while the host country’s domestic legal system is allowed to develop to the point where it is capable of managing enforcement actions on its own.¹⁵ The prohibition of the corruption of foreign public officials can be supported on the grounds that developed nations have an ethical imperative to ensure that businesses do not engage in conduct abroad that would be illegal if transacted in their home jurisdiction. However, there are also rational economic incentives for countries to ensure that multinational businesses have access to politically stable environments in which to transact business.¹⁶

2. IMPACT OF CORRUPTION ON THE RECIPIENT STATE

All transactions, domestic or international, that require the approval or involvement of government create an opportunity and incentive for bribery because such payments, where successful, may expedite the transaction or reduce compliance costs. However, bribes also create social externalities when regulations are not properly enforced or when the business providing the bribe obtains a competitive advantage over its law-abiding competition and accrues market share that is not referable to price or quality-based factors. Additionally, when corruption is pervasive, the demand for bribes by public officials serves

15. Kevin E Davis, “Does the Globalization of Anti-corruption Law Help Developing Countries?” in Susan Rose-Ackerman & Paul D Carrington, eds, *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* (Durham, NC: Carolina Academic Press, 2013) 169.

16. See Nathaniel H Leff, “Economic Development Through Bureaucratic Corruption” (1964) 8:3 *Am Behav Sci* 8 at 8-9.

as a tax on international commerce, which reduces the operational efficiency of businesses.¹⁷

Scholars considering corruption in developing economies have debated whether, notwithstanding the negative externalities associated with corruption, the payment of bribes results in positive-sum, long-term returns for the host jurisdiction. Although scholars such as David Bayley and Nathaniel Leff posit that corruption may increase efficiency by ‘greasing the wheels’ in transactions where there are weak governmental institutions, Andrei Shleifer, Robert Vishny, and Toke Aidt demonstrate that such theories focus too narrowly on the effects of corruption on a single transaction, to the exclusion of the economy as a whole. Further, Shleifer and Vishny argue convincingly that because of the clandestine nature of bribes, there is insufficient coordination and price transparency to allow a bribery-based system to attain the economic benefits and efficiency suggested by Leff and Bayley. For these reasons, bribery not only creates legal and political uncertainty for investors, it can also directly harm the efficiency and growth of countries receiving investments tainted by bribes. Regulatory intervention by investor states thus helps to address these long-run, macro-economic considerations by incentivizing investors to act in a manner conducive to long-run efficiency and growth.

Scholars opposed to foreign corrupt practices legislation have suggested that the payment of bribes in countries with weak political and legal institutions may help investors overcome regulatory impasses and increase allocative efficiency. In his seminal work, “The Effects of Corruption on Developing Nations,” David Bayley attempts to segregate the economic effects of corruption from other qualitative assessments of the impact of corruption on the social fabric of these countries.¹⁸ Bayley emphasizes that not all bribes will necessarily cause the receiving public officials to exercise their authority in an unlawful manner that provides favourable treatment to the payor or adversely affects other interests.

17. See Barbara Crutchfield George & Kathleen A Lacey, “A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives” (2000) 33:3 Cornell Int’l LJ 547 at 551-53. Recognizing that the corruption of public officials “can be traced back for centuries from several cultures and religions,” the authors emphasize that the economic linkages created by globalization and enhanced global communications have amplified the need for a globalized response to the corruption of foreign public officials (*ibid* at 551). This is due to the fact that there is a strong correlation between increased foreign investment and the opportunities for corruption.

18. David H Bayley, “The Effects of Corruption in a Developing Nation” (1966) 19:4 West Pol Q 719 at 719-20.

Rather, Bayley suggests, some bribes may help address political impasses within inefficient political systems.¹⁹ He also suggests that the externalities created by bribes may actually increase and diversify the benefits of foreign investment by diverting resources to individuals capable of reinvesting them in related industries within the jurisdiction.²⁰ Finally, Bayley suggests that the payment of bribes may have the effect of increasing the quality of a jurisdiction's public service by ensuring that remuneration is sufficient to attract and retain talented individuals.²¹ He ultimately concludes that in developing economies "corruption is an accommodating device" and that analysis of the effects of corruption ought to examine the broader impacts it has on society as a whole, as well as its incidental benefits.²²

Leff's work supports the conclusion that corruption may have positive economic effects in countries with high levels of red tape. Leff suggests that bribery may expedite bureaucratic services, facilitate transactions that would not otherwise take place, cause public officials to adopt more favourable views of activities that promote domestic economic growth, and lead them to allocate their resources to the most economically beneficial ventures.²³ He contends that opponents of corruption tend to overestimate the propensity of developing nations to allocate tax revenues for bona fide development purposes; thus, the grey market created by the payment of bribes and lost government revenue has less of a negative impact on development than opponents of corruption would otherwise suggest.²⁴ In this vein, he asserts that any cynicism towards government within a society is concentrated among persons who do not have a significant impact on the state's economy. As a result, corruption may not have a significant effect on economic decisions within the country and may actually incentivize innovation outside of government-imposed channels.²⁵ However, similar to

19. *Ibid* at 720-25. However, the payment of these bribes will raise the price of government services.

20. *Ibid* at 728.

21. *Ibid* at 728-30.

22. *Ibid* at 730-31.

23. *Supra* note 16 at 10-11, 13. Leff suggests that corruption may reduce antagonism between the bureaucracy, which may be hostile towards the wealth and prosperity of foreign investors who may rival government in terms of power and prosperity. He also asserts that corruption may reduce the risk of political uncertainty, instability, and bad policy decisions by nascent governments, provided there is no overthrow of the existing regime. The close relationship between government and the foreign investors may allow these investors to lend their managerial expertise to the government.

24. *Ibid* at 12.

25. *Ibid* at 13.

Bayley, Leff fails to consider either how corruption may affect a developing nation's economy when public officials favour one competing bid over another or how it potentially raises the total price of attaining government services.

Public choice and legal institutions theorists such as Shleifer and Vishny take issue with Leff's conclusion, arguing that corruption tends to have distortionary rather than taxation-based economic effects.²⁶ As a starting point for their analysis, they present corruption as the sale of a good over which the foreign public official has both a monopoly and the discretion to restrict the supply of the good arbitrarily with no risk of detection or penalization.²⁷ Shleifer and Vishny theorize that although bribes extracted by a single, monopolist public official may behave like a tax and may not reduce overall consumption (*i.e.*, the willingness of corporations to conduct business within the jurisdiction), the extortion of multiple, uncoordinated bribes will reduce overall consumption because prices do not collectively respond to supply-and-demand dynamics.²⁸ Thus, under this model, the economic ill resulting from corruption emanates from the lack of transparency and coordination among multiple foreign public officials, each of whom is independently extracting rents by demanding a bribe. Shleifer and Vishny conclude that the price increase resulting from corruption will have the effect of offsetting any economic benefits derived from these rents, since the higher prices for goods will reduce demand within the jurisdiction.²⁹

Similarly, scholars such as Aidt have challenged the robustness of the conclusion that bribery may increase efficiency. These scholars assess the macro relationship between corruption and economic development to determine

26. Andrei Shleifer & Robert Vishny, "Corruption" (1993) 108:3 Q J Econ 599 at 600. This model is predicated on the foreign public official applying a surcharge to the provision of a government service, in a market where the foreign public official is unable to effectively price discriminate between corporations from which he receives the bribe (*ibid* at 601-02).

27. *Ibid* at 601.

28. *Ibid* at 602, 606-11. Multiple licenses and other government approvals are conceptualized as complementary goods, such that the failure to coordinate bribes among multiple independent foreign public officials who provide the goods will reduce total demand, defined as access to the market. Consequently, a failure to take into account the demand complementarities among these licenses will lower consumption than that which would exist with a single monopolist. As a result, the failure to regulate corruption will result in the uncoordinated extortion of bribes for complementary licenses, and approvals will reduce overall demand.

29. *Ibid* at 613. This theory fails to account for bribes extracted in relation to the production of goods for export. Under such a model, and assuming the producer is incapable of shifting the location of production, the rents accrued as a result of the bribe will be retained in the jurisdiction where the bribe is extracted, while the deadweight loss will accrue in the jurisdiction where the finished good is purchased or the profits are realized.

whether corruption increases economic efficiency.³⁰ In Aidt's view, the traditional literature, which analyzes the relationship between corruption and gross domestic product ("GDP") per capita, fails to isolate the marginal effect of corruption because it discounts production that would occur irrespective of whether the investment was facilitated by corrupt practices. Aidt's own analysis goes further. He concludes that the effects of corruption are weakest in countries with weak governance.³¹ This provides partial support for the hypothesis that corruption may 'grease the wheels' for government services. Aidt's research may also suggest that the effects of corruption are less apparent because weak government institutions have diminished economic efficiency, leading to fewer opportunities for corrupt practices to negatively affect economic performance. However, Aidt also notes that if this premise is correct, it does not support a conclusion that corruption has *improved* efficiency. Rather, in these circumstances, the effects of corruption are less severe because weak governance practices provide less opportunity for harm. Aidt then concludes that, under all scenarios, corruption has the effect of reducing macroeconomic efficiency.³² In addition, he finds that corruption reduces the overall rate of per capita wealth appreciation (defined as the rate of foreign investment in capital assets less the consumption of these assets), which is lower in jurisdictions with high levels of corruption, when other factors such as initial income, education, geography, and political and legal institutions are held constant.³³

Although the payment of bribes may facilitate greater economic efficiency in discrete transactions and assist businesses in overcoming bureaucratic barriers, bribery in the aggregate ultimately destabilizes the investment climate and hinders long-term growth. International regulation thus assists in reducing the incentives for businesses to engage in corrupt practices and provides the stopgap infrastructure necessary for host jurisdictions to develop the legal regimes required to grow in a sustainable manner.

However, as discussed in Part II, below, the extraterritorial regulation of corporate conduct presents significant enforcement and compliance challenges because attitudes towards corruption differ substantially around the world, as do the incentives facing the individuals who solicit and provide bribes.

30. Aidt, *supra* note 2 at 277.

31. *Ibid* at 282.

32. *Ibid* at 283-84.

33. *Ibid* at 285-86.

B. REGULATING CORRUPTION: ENFORCEMENT AND EFFECTIVENESS CHALLENGES

Though the regulation of corporate conduct abroad may promote political stability, legal certainty, and long-term economic growth in foreign jurisdictions, the extraterritorial nature of corrupt conduct creates unique enforcement challenges. While a company's home jurisdiction may impose harsh penalties for the payment of bribes, the foreign countries in which the company operates may do little to discourage bribes or may even actively seek them. This asymmetrical treatment of the same underlying conduct results in transactional inequality and differing incentives as between the providers and recipients of bribes. A clearer understanding of the challenges and limitations associated with regulating the corruption of foreign public officials provides a foundation for reform of the Canadian anti-corruption regime. Understanding these challenges will allow reforms to be made in a manner that addresses both the opportunities for Canadian businesses to engage in bribery and the incentives that make the decision to do so rational.

The *CFPOA* defines a bribe as giving or offering to give any "loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official."³⁴ Corruption, under the *Criminal Code* and *CFPOA*, arises when a bribe is given to a domestic or foreign public official in order to obtain an advantage in the course of business, and the bribe is given as consideration for an act or omission by such an official in connection with his or her official duties or the exercise of influence in a decision-making process.³⁵

Though the underlying act of corruption is identical in both domestic and international fora, the extraterritorial nature of the corruption of foreign public officials presents significant regulatory and corporate-governance challenges. In particular, unlike the prosecution of domestic corruption (in which the individual paying the bribe and the public official who is its intended beneficiary can both be prosecuted under the *Criminal Code*), Canada only has jurisdiction to prosecute a limited range of persons under the *CFPOA*—namely, Canadian

34. *CFPOA*, *supra* note 10, s 3(1). See also *Criminal Code*, RSC 1985, c C-46, ss 121, 123 [*Criminal Code*].

35. *Ibid*; *CFPOA*, *supra* note 10, s 3(1).

citizens and persons present within Canada.³⁶ As a result, the prosecution of the foreign public official receiving the bribe, and of any employees or agents who are neither Canadian residents nor citizens, is the exclusive purview of the state in which the act of bribery occurred. However, because regulatory capacity and attitudes towards corruption vary markedly throughout the world,³⁷ there can be assurances neither that these persons will face prosecution in their home jurisdiction, nor that the home jurisdiction will have domestic legislation that criminalizes the impugned conduct.³⁸

As individuals engaged in a corrupt transaction may be governed by different legislation, the incentives and consequences associated with bribery may not be consistent for all parties. This disjointed approach to the enforcement and prosecution of corruption creates significant challenges from the perspective of regulatory theory and corporate governance when compared to domestic corruption legislation that targets all sides of a transaction in an even-handed manner. Due to the absence of effective deterrents in many jurisdictions where corruption occurs, this patchwork regulatory model relies heavily on supply-side pressures to discourage companies and their employees and agents from providing bribes. Yet the clandestine nature and extraterritorial setting of corrupt business practices make them notoriously difficult for domestic law enforcement to detect.³⁹

C. REGULATING THE SUPPLY SIDE OF CORRUPT TRANSACTIONS

Effective supply-side regulation requires a variety of regulatory tools that promote compliance and utilize progressive discipline to ensure responsiveness to a broad range of conduct and that provide incentives for corporations to develop appropriate internal controls. However, the regulatory capacity of the *CFPOA* is

36. In particular, the Ontario Superior Court's recent decision in *Chowdhury* clarified that the Canadian *CFPOA* does not extend Canada's jurisdiction over foreign corruption to include foreign nationals who are not residents of Canada and do not have a connection to Canada. See *Chowdhury*, *supra* note 3. For an overview of the Canadian *CFPOA* see also *infra* notes 143-52.

37. James Lloyd Bierstaker, "Differences in Attitude about Fraud and Corruption Across Cultures: Theory, Examples and Recommendations" (2009) 16:3 *Cross Cult Mgmt* 241 at 246.

38. See generally OECD, Anti-Corruption Initiative for Asia-Pacific, *Thematic Review, Frameworks and Practices in 28 Asian and Pacific Jurisdictions* (Paris: OECD, 2011) at 11-15, 26, 55-57.

39. Nicholas J Lord, "Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti-bribery and Corruption in the UK and Germany" (2014) 14:1 *Criminol & Crim J* 100 at 106.

limited because it relies exclusively on criminal law as its sole regulatory instrument. As a result, the costs associated with ensuring compliance with the *CFPOA* are placed squarely on government, rather than on the market participants whose employees may face incentives to engage in corrupt practices abroad.

The regulation of corrupt practices presents challenges for behaviour modification, risk mitigation, and enforcement because it requires countries to influence behaviour occurring beyond their borders. Regulatory theory provides a number of possible solutions to this challenge. Regulatory theory posits that enforcement intensity and resources should be structured in a manner that incentivizes proactive compliance and deterrence.⁴⁰ In their seminal work, *Responsive Regulation*, Ian Ayres and John Braithwaite observe that the most effective regulatory regimes devote substantial resources towards compliance promotion and progressive discipline, reserving criminal law sanctions for the most egregious offences.⁴¹ This approach emphasizes the need for a solid foundation that encourages law-abiding conduct by addressing the systemic factors giving rise to corruption, rather than focusing on the most high profile and visible misconduct.⁴² It also balances enforcement costs between corporations and government by shifting a portion of the regulatory compliance costs onto market participants.

Recent developments in regulatory theory have attempted to apply Ayres and Braithwaite's theory of responsive regulation in a transnational context. For instance, Kenneth Abbott and Duncan Snidal explore the ability of intergovernmental organizations ("IGOs") to act as responsive regulators.⁴³ Though IGOs like the UN and the Organization for Economic Co-operation and Development ("OECD") continue to play an important role in coordinating the international development of legislation on bribery of foreign public officials, the lack of effective international enforcement mechanisms means that the applicability of Ayres and Braithwaite's theory is largely restricted to state regulation at present. The reliance on state-based enforcement mechanisms

40. Poonam Puri, "Securities Litigation and Enforcement: The Canadian Perspective" (2012) 37 *Brook J Int'l L* 967 at 980.

41. Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) at 35-40.

42. John Braithwaite, "The Essence of Responsive Regulation" (2011) 44 *UBC L Rev* 475 at 480-83.

43. See generally Kenneth W Abbot & Duncan Snidal, "Taking Responsive Regulation Transnational: Strategies for International Organizations" (2013) 7:1 *Regulation & Governance* 95; Peter Grabosky, "Beyond *Responsive Regulation*: The Expanding Role of Non-state Actors in the Regulatory Process" (2013) 7:1 *Reg & Governance* 114.

to address the corruption of foreign public officials results in significant international pressure for signatory states to improve national legislation to address transnational corruption.⁴⁴

Scholars such as Marie-Laure Djelic and Sigrid Quack have suggested that classic institutionalism and domestic regulation have adopted the “agnostic stance” of classic institutionalism towards transnational solutions.⁴⁵ Transnationalist theories incorporating both state and non-state actors into a broader regulatory approach may well be capable of providing greater synergies and pragmatic solutions for addressing governance and behavioural challenges.⁴⁶ Such theories tend, however, to downplay the utility and capacity of domestic regimes to address the ills of foreign corrupt practices until such time as a comprehensive set of transnational institutions take hold.⁴⁷ To the contrary, this article proposes measures grounded in Canadian domestic law that are able to have a short- to medium-term impact on the behaviour of market participants giving rise to corruption. This approach is not, however, intended to present transnational and domestic regulatory solutions as dichotomous. Rather, both regimes serve an important role on the temporal path from identifying the issues that require regulation, to developing solutions, to collectively addressing such problems on a global scale. Transnational governance need not be regarded as

44. Lord, *supra* note 39 at 104; Patrick X Delaney, “Transnational Corruption: Regulation Across Borders” (2007) 47 Va J Int’l L 413 at 430.

45. Marie-Laure Djelic & Sigrid Quack, “Institutions and Transnationalization” in Royston Greenwood et al, eds, *The SAGE Handbook of Organizational Institutionalism* (London: Sage Publications, 2008) 299 at 300-01 (arguing that economic and social activity are increasingly being shaped by transnational forces and institutions that are not reconcilable with traditional concepts of national state power).

46. See generally Jonathan Zeitlin, “Pragmatic Transnationalism: Governance Across Borders in the Global Economy” (2011) 9:1 Socio-Economic Rev 187; Marie-Laure Djelic & Kersten Sahlin-Andersson “Introduction: A World of Governance: The Rise of Transnational Regulation” in Marie-Laure Djelic & Kersten Sahlin-Andersson eds, *Transnational Governance: Institutional Dynamics of Regulation* (Cambridge: Cambridge University Press, 2006) 1 at 4-6. A (Asserting that transnationalism “does not imply the disappearance of nation states [but rather they] are only one type of actor amongst others,” Djelic and Sahlin-Andersson suggest that a transnational perspective is more capable of understanding activities that take place within multiple jurisdictions (*ibid* at 4)).

47. See generally Tim Bartley, “Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards” (2011) 12:2 Theor Inq L 517 (arguing that transnational solutions too frequently search for a macro solution to a particular regulatory problem and fail to account for the implementation of such standards, which are more naturally within the purview of domestic regulatory actors).

filling a regulatory void that exists at the domestic level.⁴⁸ Rather, scholars such as Tim Bartley suggest that transnationalism provides a complementary layer of regulation designed to supplement existing domestic legislation.⁴⁹ Framed in this way, international conventions, monitoring by IGOs like Transparency International, and the internal initiatives of multinational corporations themselves, should be understood to work in concert with an equally important layer of national regulation.⁵⁰

Although theoretical models of transnational regulation claim numerous regulatory advantages when compared to more traditional forms of domestic regulation, state actors—and, by extension, domestic regulatory regimes—remain central at the present time. As such, analysis of the existing domestic regulatory regimes and instruments available to domestic governmental actors remains highly relevant to an analysis of the regulation of Canadian corporations' foreign corrupt practices. In our view, when applied to an anti-corruption regulatory regime, Ayres and Braithwaite's model underscores the need for legislative frameworks that encourage businesses to be proactive in developing internal controls that mitigate the risk of corruption by employees or agents and that impose a wide range of accountabilities.

We believe that the use of securities disclosure requirements and corporate law duties to encourage corporations to develop, implement, and disclose internal policies and controls will complement transnational approaches. Making use of these soft-law mechanisms familiar to domestic governments, regulators, and judges—mechanisms that have been effective in modifying behaviour in other contexts—will round out the Canadian approach to foreign corrupt practices by ensuring that corruption prevention is a priority at every level, from the individual to the international. Corporate governance norms thus play a critical

48. Kenneth W Abbott & Duncan Snidal, "Hard and Soft Law in International Governance" (2011) 54:3 Int Org 421 (suggesting that transnational regulation is an alternative to the costs and enforcement difficulties associated with a patchwork system of domestic regulation).

49. *Supra* note 48 at 519. See also Tim Bartley, "Transnational Governance and the Re-centered State: Sustainability or Legality?" (2014) 8:1 Reg & Governance 93; Jacint Jordana & David Levi-Faur, "Regional Integration and Transnational Regulatory Regimes" in László Bruszt & Gerald A McDermott, eds, *Leveling the Playing Field: Transnational Regulatory Integration and Development* (Oxford: Oxford University Press, 2014) at 175 (suggesting that governance and transnational regulatory models is one of many spheres of regulatory authority, which includes nation states and other domestic regulatory regimes).

50. Delaney, *supra* note 44 at 416.

role in supporting the international reach of domestic regulatory structures and legal standards.⁵¹

Similarly, effective communication from government regulators on what constitutes offending conduct and on what steps businesses can take to reduce their potential liability provides the necessary foundation for law enforcement officials to address instances of hard-core corruption and impose more stringent sentences on the most egregious offenders. The development of a healthy dialogue with government regulators and of transparency on the part of market participants will in turn lend support to the investigative efforts of law enforcement. Such dialogue and transparency assist regulators in compiling intelligence regarding the business practices, jurisdictions, and industries that pose the greatest risk for corrupt transactions. For these reasons, we are of the opinion that any regulatory regime designed to address both the institutional causes and individual incentives that lead to bribery must adopt a multifaceted strategy that facilitates dialogue between regulators and businesses and proactively promotes compliance while retaining the sanctions necessary to prosecute corruption aggressively. Regimes that focus exclusively on the most punitive criminal law sanctions miss opportunities for behaviour modification and disregard strategies for garnering industry buy-in to the fight against foreign corrupt practices.

D. INVESTOR STATE REGULATION OF FOREIGN CORRUPT PRACTICES

Although there has for some time been widespread recognition of the economic and social problems created by corruption, a cohesive international response to the issue has been slow in coming. For many years, governments around the world ignored the issue and in many instances allowed corporations to treat payments made to foreign public officials as tax-deductible business expenses.⁵² This section explores the development of international agreements on foreign corrupt practices. It also underscores the need for Canadian policy makers to implement international best practices to ensure that the incentives for businesses to engage in foreign bribery do not differ depending on the home jurisdiction of a business or individual.

51. Jannis Sarra, "Convergence Versus Divergence, Global Corporate Governance at the Crossroads: Governance Norms, Capital Markets & OECD Principles for Corporate Governance" (2001) 33:1 Ottawa L Rev 177 at 186-87.

52. Brademas & Heimann, *supra* note 2 at 17.

1. HISTORICAL OVERVIEW: MOVING TOWARDS A GLOBAL RESPONSE TO THE CORRUPTION OF FOREIGN PUBLIC OFFICIALS

The United States enacted the *FCPA* in 1977 in response to corruption scandals involving American companies in the developing world and revelations of the prevalence of corrupt business practices following the Watergate scandal.⁵³ Supported by the US Securities and Exchange Commission (“SEC”), the *FCPA* introduced new disclosure requirements for publicly listed companies. These disclosure standards require management to account for payments made to foreign public officials as part of their continuous disclosure obligations, irrespective of whether these payments were material from a securities law standpoint.⁵⁴ Despite objections from the accounting profession, Congress agreed with the SEC’s argument that “to require a lesser standard in defining the obligation to keep books and records could lead to the argument that falsifications or omissions below a certain amount may be tolerated.”⁵⁵

This disclosure requirement complements other provisions of the *FCPA* that require businesses to develop accounting systems to ensure that all transactions undertaken by the business are authorized by its management.⁵⁶ The legislation also attempts to “cut off the supply of bribes flowing from American businesses to corrupt foreign officials.”⁵⁷ The original *FCPA* operated as a predominantly regulatory statute designed to increase transparency of the character of payments, shed light on previously undisclosed accounts used to facilitate these payments, and incentivize issuers to develop internal controls to address corrupt payments provided by their employees or agents.⁵⁸

Despite pressure from the United States, other nations refused to follow its lead in developing anti-corruption legislation. This inconsistent treatment

53. Peter M German, “To Bribe or Not to Bribe: A Less than Ethical Dilemma, Resolved?” (2002) 9:3 J Fin Crim 249 at 249; Hurd Baruch, “The Foreign Corrupt Practices Act” (1979) 57:1 Harv Bus Rev 32 at 33.

54. *Ibid* at 33. “Materiality” was defined to be any financially important economic information, which could influence the value of the investment or the security-holder’s voting decision. However, since the 1964 decision *In re Franchard Corp*, the SEC has advocated that the integrity of management is always material. Thus, the SEC argues that management should be obligated to disclose the character and existence of any payments made to public officials since corrupt payments were relevant to security-holders’ assessment of the integrity of management.

55. *Ibid* at 33.

56. *Ibid* at 38.

57. Randall, *supra* note 9 at 664.

58. *Ibid* at 659-63.

of bribery distorted the market for international commerce and investment, and underscored the need for a comprehensive international response by the home jurisdictions of most multinational corporations.⁵⁹ Moreover, many host jurisdictions were either unwilling or unable to develop and enforce anti-bribery legislation.⁶⁰ Although the US Department of Justice (“DOJ”) recognized that “[c]ompliance with the new Act may not be costless for the United States,” it defended the *FCPA* on the basis that “living up to one’s principles rarely is.”⁶¹ American corporations were skeptical, arguing that the inconsistent regulatory framework placed them at a competitive disadvantage relative to their international peers.⁶² This early American experience illustrated that a consistent regulatory framework either regulating or not regulating corruption within the home jurisdiction of multinational corporations was required to ensure fair treatment irrespective of their jurisdiction of operation.

In 1996, the Organization of American States adopted the *United Nations Convention against Corruption*, modelled upon the *FCPA*.⁶³ This convention focused on developing systems within the signatory states to monitor the conduct of their public officials and register the “income, assets and liabilities of persons who perform public functions” and who may be targeted for corrupt payments.⁶⁴ The convention also committed signatories to developing legislation to prohibit and punish persons found to have engaged in transnational bribery.⁶⁵

Following the adoption of the convention, the OECD, in 1997, developed the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (“OECD Anti-Bribery Convention”). Canada ratified the OECD Anti-Bribery Convention in December 1998, and it entered into force shortly afterward.⁶⁶ This treaty commits member states to adopt legislation that prohibits the bribery of foreign public officials and to encourage cooperation with foreign governments in the investigation of corruption. In 2003, the UN

59. Brademas & Heimann, *supra* note 2 at 18.

60. Amy Deen Westbrook, “Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act” (2011) 45:2 Ga L Rev 489 at 514.

61. Philip B Heymann, “Justice Outlines Priorities in Prosecuting Violations of Foreign Corrupt Practices Act” (1979) Am Banker 4 at 10, cited in Randall, *supra* note 9 at 676.

62. Stanley Sporkin, “The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday” (1997) 18:2 Nw J Int’l L & Bus 269 at 276.

63. Steven R Salbu, “Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act” (1997) 54:1 Wash & Lee L Rev 229 at 234.

64. *Inter-American Convention Against Corruption*, 29 March 1996, Organization of American States, OASTS B-58 arts III, VII (entered into force 6 March 1997) [*Inter-American CAC*].

65. *Ibid*, art VIII.

66. Tronnes, *supra* note 11 at 98.

adopted the *Convention against Corruption*.⁶⁷ This convention built upon prior international agreements and criminalized a broader range of activities beyond purely monetary payments (including trading in influence).⁶⁸ Although these treaties demonstrate increased international support for the fight against bribery and corruption, their capacity and effect are largely contingent on the uniformity of their implementation and enforcement within signatory states.⁶⁹

Building upon these foundational documents, in 2009, the OECD released a series of recommendations and best practices for combatting foreign corruption.⁷⁰ These recommendations focused predominantly on removing indirect supports within the tax and international development assistance systems that may facilitate bribery.⁷¹ They also highlighted the need for increased reporting and record keeping by the financial institutions that facilitate international transactions and for heightened scrutiny on the part of the accountants and auditors who review the financial disclosure of these businesses.⁷² A final aspect of these recommendations was the development of civil, commercial, and administrative law regulations to combat foreign bribery. As will be discussed in greater detail in Part I(D)(2), below, Canada's failure to develop such regulations is considered a critical shortcoming of its foreign corruption regime.⁷³

With an international regulatory infrastructure in place, the UN and OECD have, through the publication of country monitoring reports, focused their efforts in recent years on ensuring that signatory jurisdictions develop adequate legislation and enforcement regimes.⁷⁴ These reports provide enhanced transparency on anti-corruption legislative and regulatory frameworks around the world and facilitate independent review of statutes and enforcement efforts. Through this oversight, the OECD promotes greater consistency and international cooperation in the fight against foreign corrupt practices.

67. *Convention Against Corruption*, 31 October 2003, GA Res 58/4, UNGAOR, 2003, UN Doc A/58/422.

68. *Ibid*, arts 14, 18, 23.

69. Tronnes, *supra* note 11 at 99; Gerasimova Ksenia, "Can Corruption and Economic Crime be Controlled in Developing Countries and If So, Is It Cost Effective?" (2008) 15:2 J Fin Crim 223 at 225.

70. OECD, 2009 Recommendation, *supra* note 1.

71. *Ibid*, ss III(iii), III(vii).

72. *Ibid*, ss III(v), III(vi).

73. *Ibid*, s III(viii).

74. See generally OECD, *Country reports on the implementation of the OECD Anti-Bribery Convention* (2015), online: <<http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm>>.

2. *CFPOA*

Canada enacted the *CFPOA* in 1997 to implement its international obligations under the OECD Anti-Bribery Convention.⁷⁵ This act has the effect of extending many aspects of Canada's criminal prohibitions on corruption to include the conduct of individuals and corporations operating in foreign jurisdictions. In response to international recommendations, the *CFPOA* was amended in 2013 to enhance Canada's ability to prosecute a wider range of activities and impose more stringent sentences. However, the *CFPOA* has failed to evolve beyond a criminal law statute to assume a more multifaceted regulatory role.

Under the *Criminal Code*, individuals and corporations are prohibited from providing bribes to Canadian public officials. These offences are divided into four categories: (1) bribery of officers, (2) frauds on the government, (3) bribery of judicial officers, and (4) municipal corruption.⁷⁶ Bribery of officers has the broadest scope and applies when anyone gives or offers to give "any money, valuable consideration, office, place or employment" with the intent of affecting an officer's ability or willingness to discharge his or her duties.⁷⁷ By contrast, fraud on the government applies only when anyone "gives, offers or agrees to give [any] ... loan, reward, advantage or benefit of any kind as consideration" for the public official's cooperation with respect to a transaction or "matter relating to the business of the government."⁷⁸ This provision also extends to payments made to any employee or public official with respect to the individual's dealings with that public official.⁷⁹ When a corrupt transaction occurs, the government may prosecute both the individual who provided the bribe as well as the public official who accepted it. In this respect, the legal jeopardy and deterrent effect are similar for both the payor and public official.

The *CFPOA* attempts to mirror the aforementioned provisions of the *Criminal Code* by using the term "foreign public official," which it defines broadly to include individuals falling under any of the four categories of officials captured under the *Criminal Code* and also members of a public international

75. The full title of the *CFPOA* is "An Act respecting the corruption of foreign public officials and the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and to make related amendments to other Acts." See *CFPOA*, *supra* note 10.

76. *Criminal Code*, *supra* note 34, ss 119-21, 123.

77. *Ibid*, s 120(a).

78. *Ibid*, s 121. Note that an offense may be established irrespective of whether or not the official is able to "cooperate, render assistance, exercise influence or do or omit to do what is proposed" (*ibid*).

79. *Ibid*, s 121(1)(b).

organization.⁸⁰ The offences apply to any payment made as “consideration for an act or omission by the official” or “to induce the official to use his or her position to influence any acts or decisions” of the foreign state or public international organization.⁸¹

In 2011, the OECD Working Group on Bribery released a report critical of the *CFPOA* and Canada’s conservative response to international corruption.⁸² It recommended that the *CFPOA* be amended to apply to both for-profit and non-profit entities and to limit the ability of companies convicted of a *CFPOA* offence to contract with government. It also recommended that Canada take additional steps to sanction corporations that use off-balance-sheet accounts to conceal corrupt practices.⁸³ In response to this and other international reports, the *CFPOA* was amended in 2013 by removing the requirement that businesses operate on a “for profit basis”; increasing the maximum jail term under the *CFPOA* from five to fourteen years; criminalizing the falsification of the books and records of a corporation to conceal corrupt activity; eliminating the requirement that there be a nexus between Canada and the alleged offence before charges can be laid against Canadian citizens, permanent residents, or businesses; and specifically empowering the Royal Canadian Mounted Police (“RCMP”) to lay charges under the *CFPOA*.⁸⁴ These changes strengthened the *CFPOA* by clarifying the scope of the provisions and clearly establishing the RCMP’s authority over the investigation of corruption.

A unique aspect of the *CFPOA*, when compared to legislation aimed at domestic bribery and corruption, is that it expressly criminalizes the concealment of fraudulent transactions (*e.g.*, by falsifying book entries or failing to record payments) and the establishment or maintenance of an off-the-books account for the purpose of bribing a foreign public official.⁸⁵ These amendments to the *CFPOA* mirror the SEC’s original approach to regulating corruption through

80. *Ibid*, s 120. Note that unlike section 121(2) of the *Criminal Code*, which applies to payments made to a candidate for election or political party for the purposes of retaining a government contract, the *CFPOA* does not extend to payments made to candidates or political parties who do not subsequently enter public office.

81. *CFPOA*, *supra* note 10, s 3(1)(b).

82. OECD, Working Group on Bribery in International Business Transactions, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada* (18 March 2011), online: <<http://www.oecd.org/canada/Canadaphase3reportEN.pdf>> [*Phase 3 Report*].

83. Parliament of Canada, *Legislative Summary of Bill S-14: An Act to amend the Corruption of Foreign Public Officials Act*, by Robin MacKay, Publication No 41-1-S14-E (Ottawa: Library of Parliament Research, 2013), s 1.3.

84. *Ibid*, s 2.6.

85. *CFPOA*, *supra* note 10, s 4.

enhanced disclosure requirements designed to force businesses to disclose the existence and character of all payments made. More importantly, the *CFPOA*'s accounting provisions promote greater accountability by extending liability for corrupt payments to all individuals within a corporation who facilitate or conceal payments made by others.

However, these changes stopped short of moving the *CFPOA* from a purely criminal law instrument to a more comprehensive regulatory regime. Such a move would have created incentives for businesses to internally address and minimize the risk of corruption by their employees or agents. We recognize the difficulties associated with discovering corrupt business practices, particularly in foreign jurisdictions where bribery may be more culturally acceptable or where the capacity of governmental and non-governmental organizations to investigate corruption may be limited. As such, it may be necessary to proactively target business practices that have the effect of condoning corruption or allowing senior officials to remain wilfully blind to corrupt practices abroad.

Research suggests that compliance and behaviour modification are best achieved when regulators have recourse to a variety of regulatory instruments and enforcement mechanisms.⁸⁶ Given that the resources of large corporations to defend against criminal allegations often closely match or even exceed those of government, the investigation and criminal prosecution of corporate conduct may be extremely difficult and expensive.⁸⁷ Developing a broader range of regulatory instruments would provide a measure of flexibility and cost efficiency for the regulation of foreign corrupt practices. In particular, incorporating a range of civil offences into the anti-corruption regime would help respond to the evidentiary difficulties associated with prosecuting offences where a large portion of the impugned conduct occurred in a foreign jurisdiction. It would also provide a degree of progressivity and create incentives to comply with and develop robust anti-corruption programs within corporations. For instance, imposing more stringent book- and record-keeping standards on businesses operating in foreign jurisdictions would reduce the opportunities and temptation for employees or agents to engage in corrupt conduct. Moreover, such approaches enable regulators

86. See generally John Braithwaite & Toni Makkai, "Trust and Compliance" (1994) 4:1 *Policing & Soc'y* 1; Brent Fisse & John Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993); Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Washington: Brookings Institution, 2000).

87. Poonam Puri, *Enforcement Effectiveness in Canadian Capital Markets* (Toronto: Capital Markets Institute, 2005) at 9-10.

to intervene in a wider range of corporate conduct and create incentives for corporations to develop more comprehensive controls.

E. A COMPARISON OF CANADIAN, AMERICAN, AND BRITISH FOREIGN CORRUPT PRACTICES LEGISLATION

The enforcement effectiveness of the *CFPOA* can be evaluated by reference to the *FCPA* and UK *Bribery Act*. Given the maturity of American foreign corruption legislation (first enacted in 1977), the enforcement infrastructure and regulatory framework in the United States can serve as a basis for evaluating the development of Canada's regime. Similarly, the UK *Bribery Act*, which was enacted in 2010 to criminalize the bribery of foreign public officials and hold corporations responsible for the conduct of their employees or agents who engage in foreign corrupt practices, is an example of a more contemporary regulatory structure.⁸⁸ By evaluating and comparing these three pieces of legislation, we highlight their respective strengths and shortcomings and provide recommendations for the development of comprehensive foreign corrupt practices legislation in the Canadian context. We begin the task of comparing them in Table 1.

88. UK *Bribery Act*, *supra* note 5, ss 6-7.

TABLE 1: COMPARISON OF ANTI-CORRUPTION LEGISLATION AND ENFORCEMENT STRUCTURES

	Canada	United States	United Kingdom
Date Enacted	1998	1977	2010
Investigative Authority	RCMP – International Anti-Corruption Unit.	DOJ & SEC	Ministry of Justice – Serious Fraud Office
Regulated Entity.	Persons	Issuers of securities and domestic concerns and officers, directors, employees or agents thereof.	Persons
Maximum Sentences for Acts of Bribery.	Fourteen years' imprisonment and a fine.	Five years' imprisonment and a fine of 250,000 USD for individuals or 2 million USD for corporations or twice the financial gain or loss avoided as a result of the corrupt payment for both individuals and corporations.	Ten years' imprisonment and a fine.
Guidance Documents and Regulations.	None	Advisory opinions from the Attorney General may be obtained by issuers and domestic concerns as to whether prospective conduct complies with current enforcement policies.	The Secretary of State is statutorily required to produce public-guidance documents to stipulate procedures that corporations can put in place to mitigate potential vicarious liability under the <i>Act</i> .

TABLE 1: COMPARISON OF ANTI-CORRUPTION LEGISLATION AND ENFORCEMENT STRUCTURES

	Canada	United States	United Kingdom
Books & Records Provision.	“Every person commits an offence who, for the purposes of bribing a foreign official in order to obtain or retain an advantage in the course of business or for the purposes of hiding that bribery” establishes or maintains accounts or makes transactions that are not presented in the books of the company or falsifies the books in this respect.	Reporting issuers are required to maintain books that “detail, accurately and fairly reflect the transactions and dispositions of the issuer” and “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that” transactions are authorized by management and recorded as necessary to permit the preparation of financial statements.	Under the <i>Companies Act</i> , it is an offence to fail to keep accounting records that are sufficient to show and explain the company’s transactions and disclose the company’s financial position at any point in time.
Vicarious Liability of Management for Transactions.	No	Yes – Management may be liable for failing to maintain a system of adequate internal accounting controls.	Yes – Corporations are guilty of an offence if a person associated with the corporation bribes another person in violation of the Act. However, the presence of adequate procedures designed to prevent associated persons from undertaking such conduct is a defence to liability.
Legality of Facilitating Payments.	Legal	Inconsistent Treatment – The SEC and DOJ have adopted a narrow interpretation of what constitute facilitating payments when pursuing settlement agreements. However, courts have interpreted the provision more broadly.	Illegal

1. US FOREIGN CORRUPT PRACTICES ACT

Due in part to the maturity of its foreign corrupt practices legislation and the size of its economy, the United States has more developed foreign corrupt practices enforcement than other jurisdictions. In this respect, the US legislation can be characterized as more robust than its Canadian counterpart in terms of the scope of prohibitions and punishments. Foreign corruption charges in the United States often arise through the acquisition of a company that previously engaged in corrupt practices, the conduct of foreign subsidiaries whose management is less cognizant of western standards, or the conduct of rogue employees.⁸⁹ In this respect, enforcement in the United States targets misconduct perpetrated by a broader range of individuals than does recent Canadian jurisprudence.

Similar to the *CFPOA*, the *FCPA* applies to both foreign nationals within the United States and American nationals and corporations engaged in business abroad.⁹⁰ However, the US legislation uses broader language in stating that bribes can include “anything of value.”⁹¹ “Anything of value” has been broadly interpreted by both the DOJ and SEC to include monetary benefits, gifts, favours, and donations to charitable organizations with which the impugned foreign public official has a close relationship.⁹² In addition, the US legislation applies to payments made for a broader range of purposes. The *CFPOA* requires that the bribe be in the form of a “loan, reward, advantage or benefit of any kind.”⁹³ The *CFPOA* is also limited to payments made “in order to obtain or retain an advantage in the course of business.”⁹⁴ By contrast, the *FCPA* creates four types of prohibited payments, namely: payments influencing an act or decision of a foreign public official; payments inducing an official to do or omit to do any act in violation of his or her duties; payments made for the purposes of securing an

89. Margaret Ryznar & Samer Korkor, “Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing” (2011) 76:2 Mo L Rev 415 at 417-18.

90. *Supra* note 93, §§78dd-1-78-3. See also *Chowdhury*, *supra* note 3.

91. *FCPA*, *supra* note 93, §§78dd1-1(a)(1)(B).

92. Ryznar & Korkor, *supra* note 99 at 426-27. As the authors note, in the SEC’s 2004 enforcement action against Schering-Plough Corporation, it was held that it was not necessary for the impugned foreign public official to receive a direct benefit from the bribe. Rather it is sufficient that the benefit be intangible and enhance the reputation or prestige of the recipient.

93. *CFPOA*, *supra* note 10, s 3(1).

94. *Ibid.*

improper advantage; and payments made to induce the foreign public official to use his or her influence to affect or influence a government decision.⁹⁵

The *FCPA* employs a narrower definition of “foreign official” than does the *CFPOA*. The *FCPA* limits the definition of “foreign official” to officers or employees of a “foreign government or any department, agency, or instrumentality thereof.”⁹⁶ However, subsequent US jurisprudence has broadly interpreted “instrumentality” to include “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”⁹⁷ By contrast, the *CFPOA* defines “foreign public official” to include “any person who performs public duties or functions of a foreign state.”⁹⁸ Canadian legislation thus empowers the courts to determine whether the person performs a public function without inquiring as to how the foreign government classifies the person. Moreover, public duty appears to extend to a broader range of entities than just those controlled by a government of a foreign country.

Similar to the Canadian legislation, the *FCPA* contains a books-and-records provision that criminalizes taking steps to conceal bribes. The US legislation imposes a positive obligation on public-reporting issuers to “make and keep books, records and accounts that, in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”⁹⁹ Issuers are further required to:

devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that ... transactions are executed in accordance with management’s general or specific operation; transactions are recorded as necessary ... to maintain accountability for assets; access to assets is permitted only in accordance with management’s general or specific authorization; and the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.¹⁰⁰

Consequently, an issuer’s management is required to keep accurate transaction records and is criminally liable for its wilful failure to develop a set

95. *Supra* note 93, §78dd1-1(a)(1).

96. *Ibid*, §78dd-1(f)(1)(A).

97. *United States v Esquenazi* (2014), 752 F (3d) 912, 2014 US App Lexis 9096 at 20; Ryznar & Korkor, *supra* note 95 at 427 (noting that jurisprudence on instrumentalities of government have focused largely on the corruption of state-owned enterprises).

98. *CFPOA*, *supra* note 10, s 2 (defining “foreign public official”).

99. *FCPA*, *supra* note 93, §78m(b)(2)(A).

100. *Ibid*, §78m(b)(2)(B).

of controls designed to prevent corruption.¹⁰¹ By contrast, the *CFPOA* only criminalizes instances where individuals deliberately falsify the books and records of an organization or falsify or destroy documents, books, or records for the purposes of “bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery.”¹⁰² Thus, under the *CFPOA*, there are no positive obligations on management to establish controls that address the risk that members of their business will engage in corrupt practices. Furthermore, since the *CFPOA* does not impose vicarious liability on a corporation for the conduct of its employees, there are no statutory incentives for Canadian businesses to respond aggressively to the risk of corruption within their organization. Consequently, it is possible for liability for offending conduct to be limited to a single rogue employee acting in an unauthorized capacity, thereby absolving management of any responsibility and accountability. In contrast, vicarious liability provisions in the American context provide a powerful mechanism for regulators to impose liability on parent corporations for the conduct of their subsidiaries and lower-level employees and agents.¹⁰³ The *CFPOA* could thus be strengthened by including provisions that require businesses to establish and maintain a system of internal controls sufficient to provide reasonable assurances that transactions and the use of corporate funds are authorized by management.¹⁰⁴

The *FCPA* also differs from its Canadian counterpart in that it provides a far broader range of penalties to sanction violations. Most importantly, the *FCPA* permits regulators to advance both civil and criminal claims and to disgorge profits attributable to corrupt practices upon conviction. Individuals and corporations may also be fined twice the value of any profits derived or losses avoided as a

101. *FCPA*, *supra* note 93, §§78m(b)(4)-(5). This section provides that no criminal liability shall be imposed for an individual's failure to comply with the requirements set forth in paragraph (4) unless the person knowingly circumvents or knowingly fails to implement a system of internal accounting controls or knowingly falsifies any book, record, or account described in paragraph (2).

102. *CFPOA*, *supra* note 10, s 4(1).

103. Ryznar & Korkor, *supra* note 99 at 430.

104. It should be noted that the *FCPA*'s requirement that issuers devise and maintain a system of internal accounting controls only applies to publicly listed companies and not all persons. Given that the *CFPOA* is criminal legislation, it would not be possible to limit the applicability of certain provisions only to publicly listed companies, as such a distinction may make the provision, in pith and substance, legislation regulating capital markets thus falling within provincial jurisdiction.

result of the payment of the bribes.¹⁰⁵ Access to a disgorgement remedy and specific statutory authorization to relate the magnitude of the sentence to the profits made or to loss avoided through corruption provide regulators with the capacity to directly align the magnitude of the penalty with the windfall associated with the corrupt practices. Moreover, such a remedy may also deter corruption by making punishment proportional to the financial incentive to engage in corrupt practices.

A final unique aspect of the US legislation is its credit-for-compliance regime. Although Canadian courts have been willing to grant leniency to corporations that voluntarily disclose wrongdoing and that take steps to develop internal compliance programs,¹⁰⁶ this leniency is not codified within the Canadian legislation nor are there any applicable guidance documents relating to sentencing under the Canada *CFPOA*. By contrast, the US Federal Sentencing Guidelines expressly provide that an effective compliance program can reduce a potential fine by up to 95 per cent and establish particular criteria that a compliance program must include in order to make the corporation eligible for a reduced sentence. These criteria include the creation of a whistleblower program, the ability of the program to identify the impugned act of corruption before it was discovered outside the organization, the promptness with which applicable regulators were notified, and the condition that no person within the management of the organization “participated in, condoned or was wilfully ignorant of the offense.”¹⁰⁷ In this way, corporations are provided with powerful incentives to actively identify and respond to instances of corruption within their organization. Such measures help to shine light on clandestine payments.

2. UK *BRIBERY ACT*

Prior to the enactment of the UK *Bribery Act* in 2010, the United Kingdom’s anti-corruption regime comprised a mix of common-law prohibitions and discrete statutory provisions relating to bribing of domestic and foreign public officials.¹⁰⁸ The UK *Bribery Act* was enacted in response to heavy criticism from the OECD

105. *FCPA*, *supra* note 89, §§78dd-2,3, 78ff(c)(1); 18 USC §3571(d) (4th Supp 2006) [Title 18]; *SEC v Titan Corp*, Litigation release No 19107, 84 SEC Docket 3413 (1 March 2005). Titan Corporation was disgorged of 15.5 million USD in profits associated with corrupt payments to a foreign official in Benin.

106. See *R v Griffiths Energy International*, [2013] AJ No 412, Action No 130057425Q1 (AB QB) [Griffiths].

107. Paula Desio, “An Overview of the Organizational Guidelines” *United States Sentencing Commission*, online: <www.ussc.gov/guidelines/organizational_guidelines/orgoverview.pdf>.

108. Ryznar & Korkor, *supra* note 95 at 435.

of the United Kingdom's anti-corruption regime.¹⁰⁹ From a structural perspective, the UK *Bribery Act* differs from its American and Canadian counterparts in that it applies to a broader range of individuals but is more circumscribed in the types of offences captured by the legislation.

A major distinction between the UK *Bribery Act* and the Canadian and American legislation is that it applies to payments made to any "person" for the purposes of inducing that person to perform a relevant "function or activity."¹¹⁰ In this manner, the UK *Bribery Act* overcomes the potential uncertainty that may exist as to whether an individual is a foreign public official; the *Act* instead focuses on the character of the payment. The relevant conduct influenced by the payment is defined to include not just functions and activities of a public nature but also duties connected with the performance of an individual's business or employment that the individual is expected to perform impartially and in good faith.¹¹¹ An offence will thus be established if the payment influences any public process or decision to be made in good faith, irrespective of the character or identity of the recipient. In this manner, the UK *Bribery Act* governs a wider range of activities and imposes heightened standards of business conduct on all payment beneficiaries.¹¹²

Similar to the *FCPA*, the UK *Bribery Act* creates incentives for businesses to develop internal controls to prevent corruption within their organization. However, unlike the *FCPA*, which makes it an offence for public company issuers to fail to develop reasonable internal controls,¹¹³ the UK *Bribery Act* imposes vicarious liability on "relevant commercial organizations" for the conduct of persons associated with the business that provides an illegal bribe.¹¹⁴ However, the business may submit in its defence that it had "adequate procedures designed to prevent persons ... from undertaking such conduct."¹¹⁵

This provision differs from the American legislation in two crucial respects. Firstly, the *FCPA* imposes a positive obligation on issuers to develop internal controls. As a result, issuers can be charged with non-compliance irrespective

109. Sharifa G Hunter, "A Comparative Analysis of the FCPA and the U.K. Bribery Act and the Practical Implications of Both on International Business" (2011) 18 ILSA J Int'l & Comp L 89 at 92-95.

110. UK *Bribery Act*, *supra* note 5, ss 2-3.

111. *Ibid*, ss 3(2)-(4).

112. *Ibid*, s 6.

113. *FCPA*, *supra* note 93, §§78m(b)(4)-(5).

114. UK *Bribery Act*, *supra* note 5, s 7(1).

115. *Ibid*, s 7(2).

of whether any corrupt practices take place.¹¹⁶ This allows regulators to be proactive in addressing the risk of corruption by evaluating and responding to inadequate internal controls within high-risk businesses. The development of internal controls is further incentivized by the US Federal Sentencing Guidelines, which allow the SEC and DOJ to give reduced sentences when corruption occurs within a business despite the existence of adequate internal controls.¹¹⁷ By contrast, a corporation is only liable for an offence under the UK *Bribery Act* if a person associated with the corporation is found to have engaged in corrupt conduct.¹¹⁸ Consequently, unlike the *FCPA*, the UK *Bribery Act* does not operate as a proactive regulatory instrument. Secondly, the *FCPA* is narrower in that it applies only to public issuers,¹¹⁹ whereas the UK *Bribery Act* applies to both public and private corporations.¹²⁰

Another significant distinction between the UK *Bribery Act* and the American and Canadian legislation is that the UK *Bribery Act* does not contain a books-and-records offence.¹²¹ Although the United Kingdom's *Companies Act* makes it an offence for companies to fail to maintain reasonable books and records,¹²² the two-year maximum sentence provided under the *Companies Act* is significantly less than the ten-year maximum sentence under the UK *Bribery Act*.¹²³ By contrast, the *CFPOA* imposes criminal sanctions for books-and-records offences and provides for a maximum sentence of fourteen years, which is the same as the maximum sentence for providing a bribe.¹²⁴ The *FCPA* has the most comprehensive books-and-records provisions, supported by both civil and criminal sanctions. The civil offence, which targets the failure to make and keep accurate books and records, is punishable through disgorgement and fines under the *Exchange Act*.¹²⁵ The criminal provision targets wilful falsification of books and records and is a felony under the *Exchange Act*, punishable by up to twenty years' imprisonment and fines of up to 5 million USD for individuals and up

116. *FCPA*, *supra* note 93, §78m(b)(2)(B).

117. Desio, *supra* note 117.

118. UK *Bribery Act*, *supra* note 5, s 7.

119. *FCPA*, *supra* note 93, §78m(b)(2)(B).

120. UK *Bribery Act*, *supra* note 5, s 7.

121. Officers of companies who fail to keep accounting records adequate to show and explain the company's transactions, including but not limited to entries from day-to-day transactions, may be indicted and upon conviction sentenced to up to two years in prison. See *Companies Act*, *supra* note 91, ss 86-87.

122. See generally *CFPOA*, *supra* note 10, s 3(4).

123. UK *Bribery Act*, *supra* note 5, s 11(1); *Companies Act*, *supra* note 91, s 387(3).

124. *CFPOA*, *supra* note 10, s 4; *FCPA*, *supra* note 93, §78m(b)(2)(A).

125. See *FCPA*, *supra* note 89, §7214, §78u.

to 25 million USD for organizations.¹²⁶ By criminalizing the concealment of corrupt payments and setting penalties similar to the value of the provision of the bribe itself, the *FCPA* provides a powerful accountability mechanism that discourages endemic corruption within an organization.

Finally, unlike the *CFPOA* and *FCPA*, the UK *Bribery Act* does not contain any exemption for facilitation payments.¹²⁷ Facilitation payments are defined in the *CFPOA* as payments that are not loans, rewards, advantages, or benefits made to obtain or retain an advantage, but rather are payments provided to expedite or secure the performance of any routine component of the foreign public official's duties.¹²⁸ The legitimacy of facilitation payments has been the topic of significant scholarly and regulatory debate. Most scholars accept that, where possible, the prevalence of these payments should be reduced.¹²⁹ However, because facilitation payments do not have the effect of distorting public decision making by incentivizing foreign public officials to favour one party over another, countries have been reluctant to criminalize these payments. Moreover, facilitation payments may be more ingrained in certain cultures than are direct bribes, which are widely recognized as creating an unfair marketplace.¹³⁰ Nonetheless, facilitation payments constitute a form of low-level corruption that creates externalities and may perpetuate a culture in which more serious corruption is prevalent. Currently, the *CFPOA* permits companies to make facilitation payments.¹³¹ However, *Bill S-14*, which received royal assent on 19 June 2013, contains provisions eliminating the facilitation-payment exception.¹³² Despite the proclamation of all other provisions of the bill into force, the section relating to facilitation payments remains scheduled to come into force on a future date to be fixed by order of the Governor in Council.¹³³

126. See Title 18, *supra* note 111, §1519, §1520; *FCPA*, *supra* note 89, §78ff.

127. See *FCPA*, *supra* note 89, §§78dd-3(b), (f)(4); *CFPOA*, *supra* note 10, s 3(4); Celia Wells, "Corporate Social Responsibility and Compliance in the United Kingdom" in Stefano Manacorda et al, eds, *Preventing Corporate Corruption: The Anti-Bribery Compliance Model* (New York: Springer International, 2014) 505 at 507.

128. *CFPOA*, *supra* note 10, s 3(4).

129. See OECD, *2009 Recommendation*, *supra* note 1, §VI; Robert Bailes, "Facilitation Payments: Culturally Acceptable or Unacceptably Corrupt" (2006) 15:3 *Bus Ethics Eur Rev* 293; Jeffrey A Fadiman, "A Traveler's Guide to Gifts and Bribes" (1986) 64:4 *Harv Bus Rev* 122.

130. See generally Bierstaker, *supra* note 37.

131. *CFPOA*, *supra* note 10, s 3(4).

132. Bill S-14, *An Act to Amend the Corruption of Foreign Public Officials Act*, 2d Sess, 41st Parl, 2013, s 3(2) (assented to 19 June 2013) [*Bill S-14*].

133. *Ibid*, s 5.

Given the clear lack of international consensus on whether facilitation payments should be criminalized, intermediate measures may be required to garner greater unanimity.¹³⁴ For instance, although companies are required to characterize facilitation payments properly for audit and books-and-records purposes, there is no obligation to publicly disclose these aspects of a company's financial records. Greater transparency regarding the magnitude, nature, and location of these payments could create the international pressure necessary to prompt domestic action to address the receipt of these payments by public officials and encourage companies to reduce their use of them. This could be achieved by mandating disclosure of such payments in audited financial statements. Other intermediate measures might include creating a separate, less punitive offence for facilitation payments or disallowing the deductibility of properly characterized facilitation payments for income-tax purposes.

F. ENHANCING GLOBAL STANDARDS FOR THE REGULATION OF CORRUPTION

Although anti-corruption legislation in Canada, the United States, and the United Kingdom is structured to comply with the requirements set forth in the OECD Anti-Bribery Convention, there are significant differences between the three pieces of legislation. In particular, there is a lack of consistency in the types of transfers that may constitute bribes and in the definition of a foreign public official. Given the fact that companies frequently operate in many signatory jurisdictions, it is critical that these central terms have a common definition among the participating jurisdictions.

Anti-corruption legislation can play a prominent role in creating incentives for businesses to address corruption risk within their organization. All three jurisdictions adopt differing approaches with respect to the duties of corporations to proactively address corruption risk within their organizations. Canada's approach is the most simplistic, utilizing a books-and-records provision as the sole incentive for corporations to take preventive measures. This strategy relies heavily on auditors to identify misattributed transactions and may allow management to remain apathetic towards these transactions, particularly when bribes do not have a discernible effect on the company's financial statements. By contrast, the United States and United Kingdom hold officers liable in certain circumstances for failing to develop adequate internal controls. We are of the opinion that a hybrid of the American and British model, which holds all companies—not

134. See for instance OECD, *2009 Recommendation*, *supra* note 1, s §VI (recommending that countries encourage companies to eliminate the use of small facilitation payments).

just public issuers—liable for failing to develop reasonable internal controls, is most desirable because it creates incentives for companies to respond proactively to corruption risk within their organizations. These documents can be used as models for the development of similar guidance in the Canadian context.

A final aspect of the development of an effective anti-corruption regime is the provision of supplemental guidance to assist businesses in understanding how the legislation will be applied and how they can implement best practices to mitigate corruption risk within their organizations. It is worth noting that the Government of Canada has not created any regulations or guidance documents to assist businesses in understanding their roles and responsibilities in relation to the *CFPOA*. By contrast, the United States has developed a comprehensive resource guide for the *FCPA*. This resource guide discusses the provisions of the legislation and provides businesses with examples of how certain conduct would be treated by the applicable regulatory bodies.¹³⁵ A similar document was created by the United Kingdom's Department of Justice for the UK *Bribery Act*.¹³⁶

II. ENFORCEMENT OF FOREIGN CORRUPT PRACTICES LEGISLATION

A strong regulatory framework is only effective if it is appropriately enforced. For this reason, Part II considers current jurisprudence under the *CFPOA* and evaluates it against recent global enforcement trends. In doing so, we identify enforcement difficulties that any reform of the Canadian foreign corrupt practices framework ought to address. As the challenges of enforcing the *CFPOA* span all procedural stages, from detection to sentencing, our analysis focuses on the few cases under the *Act* that have reached judgement.

A. ENFORCEMENT OF THE *CFPOA*

As criminal legislation, the *CFPOA* is administered and enforced by the RCMP through its specialized International Corruption Unit ("ICU"). The ICU was created in 2008 and maintains teams in Calgary and Ottawa.¹³⁷ The ICU

135. US, Department of Justice & Securities and Exchange Commission, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Washington: US Government Printing Office, 2012), online: <<http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>> [*FCPA Guide*].

136. "Bribery Act 2010," *supra* note 91.

137. Mallory Procunier, "A Little Payment Here, A Little Gift There," *Gazette Magazine* 75:3 (2013) 7, online: <<http://www.rcmp-grc.gc.ca/gazette/vol75no3/vol75no3-eng.pdf>>.

operates in conjunction with Calgary's Financial Integrity Unit and the Sensitive and International Investigations Section in Ottawa.¹³⁸ These units are mandated to facilitate the investigation, prosecution, prevention, and detection of offences under the *CFPOA*.¹³⁹ Since its enactment in 1998, four convictions have been rendered under the *CFPOA* and the scope of the *Act* was judicially considered in one additional decision.

This Part considers current jurisprudence under the *CFPOA* and evaluates these decisions against recent global enforcement trends. Similar to other jurisdictions, Canada faces significant challenges in the enforcement of its foreign corrupt practices legislation. Because enforcement actions around the world most frequently involve corruption in jurisdictions with low overall corruption levels, it appears that enforcement resources and systems in particular may be lacking. Although Canada's enforcement levels are close to those in similarly sized jurisdictions, Canada's courts appear to be reluctant to impose heavy sentences on individuals involved in corruption scandals. Moreover, given the limited case law applying the *CFPOA*, jurisprudential analysis of foreign corrupt practices is significantly less developed than other areas of criminal and regulatory law in Canada. As ongoing corruption investigations proceed through the courts, it will be important to observe whether Canadian courts utilize a broader and more progressive range of sanctions that is responsive to the nature of corrupt acts.

1. *CHOWDHURY V CANADA*: TERRITORIAL LIMITS OF THE *CFPOA*

A fundamental distinction between the *CFPOA* and *Criminal Code* provisions relating to corruption is that the *CFPOA* applies, in theory, to foreign public officials who receive bribes or to individuals who act as intermediaries in providing these bribes to foreign public officials. However, the Ontario Superior Court determined in *Chowdhury* that a Bangladeshi citizen and public official, who allegedly received payments from SNC-Lavalin Group Incorporated ("SNC-Lavalin") as consideration for his promise to exert influence over the selection committee for a construction project in Bangladesh, could not be charged under the *CFPOA*. The court reasoned that the *Act* does not extend Canada's jurisdiction to include foreign nationals who are not Canadian

138. *Ibid* at 9.

139. Gord Drayton, "International Anti Corruption Teams" *Royal Canadian Mounted Police* (2010) at 11, online: Transparency International <http://www.transparency.ca/Archive/9-Files/Older/2010/2010-TI_Avoiding_Pitfalls_RCMP.pdf>.

residents.¹⁴⁰ Consequently, the prosecution of foreign nationals and foreign public officials generally remains within the exclusive purview of the host state.

In *Chowdhury*, the Crown brought charges against five individuals who allegedly participated in bribing Bangladeshi officials in the furtherance of SNC-Lavalin's bid to provide consultancy services for the construction of a bridge.¹⁴¹ Three of the accused were former SNC-Lavalin employees. The other two accused, including Chowdhury, were Bangladeshi citizens and public officials. Chowdhury allegedly received payments from SNC-Lavalin as consideration for his promise to exert influence over the selection committee for a construction project in Bangladesh.¹⁴² Although the Crown had not taken any steps to secure Chowdhury's arrest, Chowdhury brought an application for an order of prohibition with *certiorari* to bar the Crown from advancing charges against him.¹⁴³

The Superior Court held that Canada has jurisdiction under the *CFPOA* to prosecute corruption offences involving Canadian citizens, even if they occur exclusively abroad.¹⁴⁴ Citing the Supreme Court of Canada in *Libman*,¹⁴⁵ Justice Nordheimer explained that Canada has a legitimate interest in protecting its citizens from harms perpetrated in other countries.¹⁴⁶ For this reason, the objective territoriality principle allows countries to prosecute offences that take place abroad but that harm the prosecuting country.¹⁴⁷ Under the principle of objective territoriality, an offence is subject to the jurisdiction of Canadian courts if there is a "real and substantial" link between Canada and the offence.¹⁴⁸ By recognizing Canada's jurisdiction to prosecute foreign corruption offences involving Canadians, Justice Nordheimer tacitly acknowledged that international corruption causes direct harm in Canada, irrespective of the location of the offence.

However, Justice Nordheimer went on to distinguish between jurisdiction over an offence and jurisdiction over a person.¹⁴⁹ Jurisdiction over persons, as opposed to offences, is governed by different international principles. Sovereignty, as a foundational principle in international law, gives states jurisdiction over

140. *Chowdhury*, *supra* note 3 at paras 54-57.

141. *Ibid* at paras 3-4.

142. *Ibid* at para 6.

143. *Ibid* at para 8.

144. *Ibid* at para 39.

145. *Libman v R*, [1985] 2 SCR 178, 21 DLR (4th) 174.

146. *Chowdhury*, *supra* note 3 at paras 25-26.

147. *Ibid* at para 23.

148. *Ibid* at para 60.

149. *Ibid* at para 27.

persons, conduct, and events within their borders.¹⁵⁰ The principle of comity creates the presumption that legislation is enacted in compliance with Canadian treaty obligations and should be interpreted in accordance with them. The court interpreted the definition of “person” under the *CFPOA* in light of these principles to decide whether it included foreign nationals located outside of Canada and whose offences were committed outside of Canada. Although “person” is used in the *CFPOA* in an unqualified manner, the *Act* does not expressly state that it applies to actions undertaken wholly outside of Canada.¹⁵¹ The court held that to assert jurisdiction over foreign nationals outside of Canada, Parliament would have to override international legal principles. Consequently, express language would be required.¹⁵² Since the *CFPOA* does not expressly state that it applies to foreign nationals outside of Canada, the court held that Canada does not have jurisdiction over them.¹⁵³ Thus, prosecution of foreign nationals involved in a corrupt transaction is the purview of their home state unless and until they voluntarily come to Canada or their home state chooses to surrender them.¹⁵⁴

2. *R V WATTS*: CANADA’S FIRST CONVICTION UNDER THE *CFPOA*

Eight years after the *CFPOA* was enacted, the Alberta Court of Queen’s Bench approved Canada’s first guilty plea under the *Act*. In *Watts*, a lenient fine of \$25,000 was imposed against the defendant’s corporation, Hydro Kleen Systems Incorporated (“Hydro Kleen Systems”), for bribes of \$28,299.88. The bribes had been paid to Hector Ramirez Garcia, an official of the US Immigration and Naturalization Service, to expedite immigration matters for Hydro Kleen Systems employees traveling to the United States.¹⁵⁵

Robert Watts was the president and controlling shareholder of Hydro Kleen Systems and was the “directing mind” behind a scheme to make covert payments to Garcia in exchange for his assistance on immigration matters. The payments were made through a partnership established by Garcia and his wife, as payment for Garcia’s assistance on immigration matters.¹⁵⁶ Over the course of the scheme,

150. *Ibid* at para 29.

151. *Ibid* at para 19.

152. *Ibid* at paras 35-36.

153. *Ibid* at paras 44-45.

154. *Ibid* at para 54.

155. *R v Watts*, [2005] AJ 568 (QB) at paras 20, 51, 158-62, 189 [*Watts*]. Although Mr. Garcia’s retainer did not expressly state that he would provide favourable treatment to Hydro Kleen Systems employees, the court and counsel for Watts and Hydro Kleen Services agreed that such treatment may have been implied by the parties.

156. 165 *Ibid* at paras 41, 49-50.

Watts also took steps to conceal the fact that Garcia was an American official by directing Garcia not to advise employees of Hydro Kleen Systems of his position with the US government or to wear his Department of Justice uniform when visiting Hydro Kleen Systems' premises.¹⁵⁷ One of Watts's conspirators also directed Hydro Kleen Systems employees not to acknowledge their relationship with Garcia if contacted by outside sources.¹⁵⁸

Hydro Kleen Systems' corrupt practices were revealed following the execution of an *Anton Piller* search warrant.¹⁵⁹ The warrant, which granted officials the right to search Hydro Kleen Systems' premises and seize evidence without warning, was obtained by a competitor of the company that had become suspicious of Hydro Kleen Systems' preferential treatment by American immigration officials.¹⁶⁰ Despite the direct involvement of senior Hydro Kleen Systems officers and employees in the corruption, the sentencing order was directed at Hydro Kleen Systems as a corporate entity, not at the responsible individuals in their personal capacity. By contrast, Garcia pleaded guilty and was convicted under the *Criminal Code* for corruptly accepting a secret commission and was sentenced to six months in prison. After his release in February 2003, Garcia was deported to the United States where he faced prosecution and pleaded guilty to charges under American corruption legislation.¹⁶¹

This sentence appears significantly out of step with subsequent fines imposed on corporations but entirely consistent with Canada's reluctance to prosecute individuals involved in a corrupt transaction in their personal capacity. It is worth noting that in reviewing the appropriateness of the sentence, Justice Sirrs did not consider *Criminal Code* jurisprudence for the corruption of domestic public officials. Instead, he relied on the prosecution's recommendation regarding the magnitude of the fine and its deterrent effect. Though he took judicial notice of the fact that the operating minds of the corporation were able to escape "the stigma attached to a criminal record" by way of a plea bargain, he was hesitant to disrupt the bargain reached by the prosecution and defence.¹⁶² In the years

157. *Ibid* at para 60.

158. *Ibid* at para 59.

159. See *Anton Piller KG v Manufacturing Process Ltd* [1976] Ch 55, 1 All ER 799.

160. *Watts*, *supra* note 165 at paras 70-74.

161. *R v Garcia*, [2002] AJ No 1262, 325 AR 85; *Watts*, *supra* note 164 at paras 178-79; *Criminal Code*, *supra* note 10, s 426(1).

162. *Watts*, *supra* note 165 at paras 184-85.

following the *Watts* decision, Canada has been harshly criticized by the OECD for its limited and ineffectual enforcement efforts.¹⁶³

3. *R v NIKO RESOURCES LTD.*: STRENGTHENING THE PENALTIES FOR CORRUPTION

In the second conviction under the *CFPOA*, Niko Resources Limited (“Niko Resources”) pleaded guilty to bribing the Bangladeshi State Minister for Energy and Resources with the use of a vehicle valued at \$190,984 and paying for the Minister’s travel and accommodations (valued at approximately \$5,000) to attend a conference in Calgary.¹⁶⁴ These bribes were facilitated by a Niko Resources agent in Bangladesh to mitigate negative publicity following an explosion at a site owned through a joint-venture agreement between Niko Resources’ Bangladeshi subsidiary and the state-owned Bangladesh Petroleum Exploration & Production Company Limited (“BAPEX”).¹⁶⁵

Following the explosion, Niko Resources provided the Bangladeshi Minister with two non-pecuniary benefits that became the subject of the *CFPOA* charges. The vehicle provided to the Bangladeshi Minister was originally purchased as part of the joint-venture agreement for BAPEX’s use and registered in BAPEX’s name.¹⁶⁶ However, following the explosion and ensuing negative publicity, BAPEX directed Niko Resources to provide the vehicle to the Bangladeshi Minister and Niko Resources followed BAPEX’s suggestion.¹⁶⁷ Upon the delivery of the vehicle, Niko Resources delivered a letter to the Bangladeshi Minister thanking him for his prior support and reflecting their hope that such treatment would endure in the coming days.¹⁶⁸

Evidence of this arrangement was revealed in an article published by a Bangladeshi newspaper approximately three weeks after the vehicle was delivered to the Minister.¹⁶⁹ Niko Resources was fined \$8.26 million, plus a 15

163. OECD, Newsroom, “Canada’s enforcement of the foreign bribery offence still lagging; must urgently boost efforts to prosecute” (28 March 2011), online: <<http://www.oecd.org/newsroom/canadasenforcementoftheforeignbriberyoffencesstilllaggingmusturgentlyboosteffortstoprosecute.htm>>.

164. *R v Niko Resources Ltd.*, [2011] CarswellAlta 2521 (QB) at paras 4-5, [2012] AWLD 4536. Paragraph 21 of the decision outlines the terms of the probation order.

165. See generally *ibid* at para 21, ss 21-24.

166. *Ibid* at para 21, s 29.

167. *Ibid* at para 21, s 30.

168. *Ibid* at para 21, s 33. As the Canadian parent corporation, Niko Resources admitted that, for criminal law purposes, it would be deemed to know of the letter.

169. *Ibid* at para 21, s 38.

per cent victim fine surcharge, and was sentenced to three years' probation.¹⁷⁰ The probation order obligated Niko Resources to, among other things, disclose any ongoing criminal or administrative investigations to the RCMP during the duration of the probation; cooperate fully with any subsequent investigations relating to matters contained in the Agreed Statement of Facts; strengthen its "compliance, record keeping, and internal controls standards" in accordance with the procedures set out in the probation order; and report periodically regarding its implementation of these procedures.¹⁷¹ Disregarding the precedent established by the *Watts* guilty plea, Justice Brooker considered the range of fines imposed in American corruption cases.¹⁷² This increased sensitivity to international jurisprudence and sentencing guidelines may be a response to the international criticism of Canada's enforcement of its foreign corruption legislation.

4. *R V GRIFFITHS ENERGY INTERNATIONAL*: LENIENCY FOR VOLUNTARY DISCLOSURE OF THE CORRUPTION OF FOREIGN PUBLIC OFFICIALS BY MEMBERS OF A CORPORATION

The third Canadian corruption conviction involved Griffiths Energy International ("Griffiths Energy"), which pleaded guilty to providing payments of 2 million USD plus founders' shares of Griffiths Energy to a corporation controlled by the wife of the Chadian ambassador to the United States.¹⁷³

The charges in this case arose from the acquisition by Griffiths Energy and its predecessor Mogul Energy International of oil and gas exploration properties in the Republic of Chad from 2008-2011.¹⁷⁴ In 2009, Griffiths Energy was created to facilitate investment in Chad. In furtherance of this investment, Griffiths Energy entered into a 2 million USD consulting agreement with the Maryland corporation, Ambassade du Tchad LLC, which was created by the Chadian ambassador in Washington. The funds payable in conjunction with this consulting agreement were to be transferred after the purchase of the exploration properties closed. However, Griffiths Energy's former external counsel advised

170. *Ibid* at para 21, s 5.

171. See generally *ibid* at para 21, ss 60-64.

172. *Ibid* at para 21, s 9.

173. Carrie Tait, "Griffiths to pay millions in African bribery case" *The Globe and Mail* (22 January 2013), online: <www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/griffiths-to-pay-millions-in-african-bribery-case/article7622364/>; *Griffiths*, *supra* note 115 at para 7.

174. See generally *R v Griffiths Energy International*, [2013] AJ No 412, Action No 130057425Q1 (AB QB) (Evidence, Agreed Statement of Facts), online: <http://www.millerchevalier.com/portalresource/Spring2013_GriffithsAmendedStatementofFacts>.

that the consulting agreement could constitute an illegal bribe and the consulting agreement was terminated with no payments being made.¹⁷⁵

Weeks later, a second, identical consulting agreement was drafted between Griffiths Energy and a Nevada corporation, Chad Oil Consulting LLC, which was wholly owned by the Chadian ambassador's wife, Nouracham Niam. At the same time, Ms. Niam and two of her associates were issued a total of four million founders' shares in Griffiths Energy at a price of 0.001 USD per share.¹⁷⁶ Nine days later, a memorandum of understanding between the Government of Chad and Griffiths Energy was concluded with respect to the impugned exploration properties. As a result of regulatory changes in Chad, the consulting agreement with Chad Oil Consulting LLC was referred to Griffiths Energy's new external counsel, who redrafted the consulting agreement to incorporate the revised purchase agreement and hold the 2 million USD in escrow pending the closing of the transaction. Once the transaction was completed, the external counsel released the funds from escrow and they were transferred to an account provided by an official at the Chadian Embassy in Washington in early 2011.¹⁷⁷

After the completion of this acquisition, Griffiths Energy's management team and board of directors changed. None of the incoming directors or managers was aware of the consulting agreements. The impugned transactions were later uncovered during diligence in advance of the company's initial public offering. After a comprehensive internal investigation, the Public Prosecution Service of Canada and Alberta Justice were advised of the corrupt transactions.¹⁷⁸

When reviewing proposed fines of \$9 million plus a 15 per cent victim fine surcharge, the Alberta Court of Queen's Bench noted that Griffiths Energy had voluntarily disclosed the corruption, cooperated fully with the investigation, and implemented a comprehensive and robust anti-corruption program following the discovery.¹⁷⁹ The court was particularly sensitive to the possibility that had the new officers and directors of Griffiths Energy not voluntarily disclosed the corruption, it was "[c]onceivable ... [that] this crime might never have been discovered."¹⁸⁰ Despite their involvement in facilitating the bribes, no criminal convictions were registered against either Brad Griffiths or Naeem Tyab (two of Griffiths Energy's founders) for their involvement in the corrupt business practices. No disciplinary

175. *Ibid* at paras 19-21.

176. *Ibid* at paras 22-27.

177. *Ibid* at paras 33-38.

178. *Ibid*.

179. *Griffiths*, *supra* note 116 at paras 15-19.

180. *Ibid* at para 15.

actions were taken against any of the advisors involved in the payment of the bribes and issuance of the founders' shares.¹⁸¹

5. *R V KARIGAR*: CANADA'S FIRST CONVICTION OF AN INDIVIDUAL UNDER THE CFPOA

In 2013, following a full trial, the Ontario Superior Court rendered the first criminal sentence of an individual under the *CFPOA* to Nazir Karigar, who was convicted of providing a 450,000 USD bribe to Air India officials and the Indian Minister of Civil Aviation as consideration for favourable treatment on the tendering of government contracts. As a result of his involvement in the bribery, Karigar was sentenced to three years' imprisonment.¹⁸²

Karigar had acted as an agent in India for his co-conspirator, Robert Bell, who was responsible for tendering Cryptometrics Canada's bid for a number of Air India contracts. While preparing the bid, Karigar and Bell were advised by one of Karigar's business associates in India that bribes were required to secure a contract from Air India.¹⁸³ As a result, Bell arranged for the funds to be transferred to Karigar, who in turn directed them to the Indian Minister of Civil Aviation.

However, after transferring the funds to the Indian Minister of Civil Aviation, Karigar did not receive confirmation that the contract had been awarded in his favour. He voluntarily approached the Canadian Consulate in Mumbai and advised an official that the Indian Minister of Civil Aviation had misappropriated the bribe. He then requested immunity from any charges that might result from the previously disclosed act of bribery.¹⁸⁴ Instead, Canadian

181. Carrie Tait & Kelly Cryderman, "The Canadian energy executive at the centre of the Griffiths corruption scandal" *The Globe and Mail* (24 January 2013), online: <<http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/the-Canadian-energy-executive-at-the-centre-of-the-griffiths-corruption-scandal/article7725093/>>. Note that Brad Griffiths perished in 2011 before a conviction was entered against Griffiths Energy.

182. *R v Karigar*, 2013 ONSC 5199, 108 WCB (2d) 290 [*Karigar*, 2013]. A subsequent bribe of 650,000 USD was also paid by Cryptometrics Canada's American parent corporation, Cryptometrics Inc. See also *R v Karigar*, 2014 ONSC 3093, 113 WCB (2d) 373 [*Karigar*, 2014].

183. *Karigar*, 2013, *ibid* at para 7.

184. *Ibid* at para 15.

officials charged Karigar with violating section 3 of the *CFPOA*. Robert Bell was granted immunity from prosecution in exchange for testifying against Karigar.¹⁸⁵

In determining the appropriate sentence, the court considered jurisprudence relating to serious criminal fraud and corruption by domestic public officials and held that imprisonment of three to five years was generally appropriate for crimes of this nature.¹⁸⁶ Although a three-year sentence was toward the upper end of the five-year maximum for the corruption of foreign public officials, it should be noted that the *CFPOA* was amended after Karigar was charged, increasing the maximum sentence from five to fourteen years' imprisonment.¹⁸⁷ It is thus unclear whether subsequent courts will feel compelled to follow the sentencing guidelines established in *Karigar* or will impose the more stringent sentences now available under the *Act*.

6. ANALYSIS OF CANADIAN ENFORCEMENT TRENDS UNDER THE *CFPOA*

Although there is limited jurisprudence under the *CFPOA*, current enforcement efforts show a troubling lack of consistency both in terms of the magnitude of sentences issued and the number of individuals prosecuted to date. Most notably, the \$25,000 fine in *Watts* appears grossly disproportionate to the \$8.26 million fine issued in *Niko Resources*, particularly when one considers the complicity of senior officials in *Watts*. Moreover, the amount of the fine does not appear commensurate with the value of the bribe provided, as fines range from 0.9 to 48.5 times the value of the initial payment.

A second concern relates to the use of criminal sanctions against individuals involved in corrupt activity. To date, none of the individuals responsible for providing the funds used to bribe foreign public officials have been held personally responsible for the payment. Rather, criminal sanctions have focused on the intermediaries involved in the corruption. The *Karigar* case is a prime example. Robert Bell, the Canadian Vice-President, Business Development, of Cryptometrics Canada, provided the payment to Karigar, who ultimately delivered the bribe to Indian officials. Bell himself was not indicted after he agreed to testify against Karigar. Similarly, in *Watts*, the American public official

185. Canada, Royal Canadian Mounted Police, "RCMP Charge Individuals with Foreign Corruption" (4 June 2014), online: <www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2014/0604-corruption-eng.htm>. The RCMP have also charged US nationals Robert Barra and Dario Berini (who were the former CEO and COO, respectively, of Cryptometrics) and UK national Shailesh Govindia (who was an agent of Cryptometrics) with criminal fraud and corruption under the *Criminal Code* and *CFPOA*.

186. *Karigar*, 2014, *supra* note 192 at paras 20-24, 29-32.

187. *Bill S-14*, *supra* note 142.

retained by Hydro Kleen Systems was prosecuted under the *Criminal Code* for accepting the bribes. Yet Robert Watts, who had arranged the bribery scheme, was able to negotiate to have the conviction registered against Hydro Kleen Systems rather than himself. Consequently, Canadian senior officers have, to this point, been able to avoid direct responsibility for their business practices and have avoided prosecution while the corporations have been convicted in place of the individuals.

With respect to the location or industry of the prosecutions, there appear to be no clear trends within the Canadian jurisprudence or Canadian involvement in foreign corrupt practices. Although cases on foreign corrupt practices have been concentrated in Alberta and Ontario, the resulting convictions yield little evidence on broader patterns regarding corrupt business practices perpetrated by Canadian corporations or the effectiveness of the enforcement practices of Canadian law enforcement officials. To date, all convictions for foreign corrupt practices have resulted from investigations conducted by private parties or from voluntary disclosure by the accused.¹⁸⁸ This suggests that effective detection of corrupt business practices is largely influenced by the internal controls within corporations and investigations by non-governmental and governmental organizations in foreign jurisdictions. However, it is worth noting that the locations of these prosecutions correspond with the RCMP's two ICUs, based in Calgary and Ottawa, suggesting that effective access to these law enforcement agencies may help promote greater regional awareness and facilitate disclosure of illegal business practices.

188. Similarly, recent criminal charges against SNC-Lavalin for allegedly paying \$35 million in bribes to Libyan government officials were uncovered by SNC-Lavalin's audit committee following an internal investigation. See Canada, Royal Canadian Mounted Police, "RCMP Charges SNC-Lavalin" (19 February 2015), online: <www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2015/0219-lavalin-eng.htm>; SNC-Lavalin, "SNC-Lavalin provides update on announcement of 2011 financial results and impact on 2011 outlook" (28 February 2012), online: <www.snclavalin.com/en/snclavalin-provides-update-on-announcement-of-2011-financial-results-and-impact-on-2011-outlook>; SNC-Lavalin, "SNC-Lavalin Reports on Results of Voluntary Independent Review" (26 March 2012), online: <<http://investors.snclavalin.com/en/news-releases-and-ir-calendar/news-releases/1707/>>. Following this, the RCMP commenced a criminal investigation. See Tu Thanh & Ingrid Peritz, "RCMP searching SNC-Lavalin headquarters" *The Globe and Mail* (13 April 2012), online: <www.theglobeandmail.com/globe-investor/rcmp-searching-snc-lavalin-headquarters/article4210190/>. The role of SNC-Lavalin's internal controls process and audit committee in uncovering potential violations of the *CFPOA* highlights the capacity of internal controls to serve an important role in identifying offending conduct as well as the limits on traditional criminal law enforcement regimes.

Despite a marked increase in the number of *CFPOA* convictions, the relatively small number of prosecutions underscores the challenges associated with identifying and prosecuting corruption. Payments that exchange hands abroad—often through foreign subsidiaries, third parties, or intermediaries—are notoriously difficult for law enforcement officials based in Canada to trace. As a result, corporations themselves appear best positioned to detect corrupt practices within their businesses and to put controls in place to prevent them. The implementation of a regulatory pyramid that uses disclosure requirements and low-level sanctions to motivate corporations to implement preventive measures will shift the enforcement burden from the RCMP, which achieves enforcement poorly and at high cost, to the corporations themselves. In designing this pyramid, Canadian policy makers will benefit from greater understanding of the types and prevalence of corruption occurring around the world. A clearer understanding of the forms that corruption takes within bureaucratic and political structures will also facilitate more precise and cost-effective enforcement efforts.

Once a better understanding of the market for corrupt payments has been established, we are of the opinion that a regulatory-pyramid model should be employed to focus enforcement resources and intensity on reducing the prevalence of institutional corruption. Such an approach would commit resources to working with companies to develop internal compliance programs and use sanctions that encourage behaviour modification when companies fail to comply. Given the prominent role of the audit committee and internal controls within corporations previously sanctioned under the *CFPOA*, it is evident that domestic regulation must look to capitalize on the unique ability of companies to identify fraud within their organizations. This could be achieved through a combination of partnerships between law enforcement and businesses as well as potential regulatory changes that incentivize businesses operating in foreign jurisdictions to develop these controls. For instance, businesses could receive reduced sentences if they uncover instances of corruption in a timely manner, but harsher sentences if the corruption is uncovered only after a protracted period of time, identified by whistleblowers, or uncovered by law enforcement. By way of example, such a regime could provide a 75 per cent reduction in an offender's sentence if the corruption is uncovered within one year, 50 per cent within two years, 25 per cent after three years, and no reduction if the corruption is discovered after four or more years. Moreover, under the current *CFPOA*, there are no incentives for individuals or corporations to disclose foreign corrupt practices within an organization if they were not party to the impugned transaction. Imposing vicarious liability on certain core employees or officers who fail to report

corruption that they become aware of (or to which they are wilfully blind) would help address the incentives that exist for companies to suppress or ignore corrupt payments made at lower levels within the organizational structure. This liability would incentivize companies to develop robust compliance programs.

In sum, we are of the opinion that both statutory amendments and more proactive engagement by law enforcement officials to identify patterns of corruption at all levels are necessary to provide greater enforcement effectiveness. A regulatory pyramid should be employed to promote a more comprehensive and holistic approach to the regulation of Canadian businesses operating abroad. Both regulatory scrutiny and sanctions should reflect the nature of the offence and the prior conduct of the organization to ensure that the regulatory system operates to incentivize compliance rather than sporadically sanction what appears to be the most egregious conduct. In order to achieve this end, a clearer understanding of the incentives and interactions giving rise to foreign corrupt practices in foreign jurisdictions is required.

B. INTERNATIONAL FOREIGN CORRUPT PRACTICES ENFORCEMENT ACTIVITIES

In December 2014, the OECD released a comprehensive report on foreign corrupt practices and enforcement actions initiated since the entry into force of the OECD Anti-Bribery Convention.¹⁸⁹ This section discusses the findings of the report with a view to identifying the strengths and shortcomings of global anti-corruption investigation and enforcement efforts.

At the outset it should be noted that the OECD's analysis focuses on enforcement actions rather than on the actual provision of bribes or occurrence of corruption. As a result, these statistics may reflect systemic selection biases resulting from the tendency of law enforcement to direct investigative and enforcement resources towards sectors perceived as having a high risk of corruption and towards prosecutions that are regarded as having the highest potential deterrent effects.

As previously identified, two of the principal challenges associated with the enforcement of anti-corruption legislation are the clandestine nature of bribes and the fact that evidence of the offence is frequently located outside of the enforcing jurisdiction. Thus it is not surprising that one-third of cases resulted from self-reporting, of which 31 per cent were disclosed following the discovery of the bribes in the course of an internal audit and 28 per cent

189. See OECD, Secretary General, *Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (Paris: OECD, 2014) [OECD, Foreign Bribery Report].

through transactional due diligence.¹⁹⁰ Only 26 per cent of cases resulted from investigations initiated directly by law enforcement officials or through mutual legal assistance between countries.¹⁹¹ A further 2 per cent of cases of corruption are reported by whistleblowers.¹⁹² By contrast, in instances of financial fraud in the United States, employees report 17 per cent of corporate frauds to authorities.¹⁹³ This difference may be indicative of differences in cultural attitudes towards corruption as compared to corporate fraud. Assuming that there is less of a cultural stigma towards corruption as compared to fraud, the significant negative consequences facing whistleblowers may be accentuated if they come forward to disclose corruption.¹⁹⁴

Interestingly, 67 per cent of bribes were paid to public officials in countries ranked as medium to very high on the United Nations' Human Development Index.¹⁹⁵ This is paradoxical given that Transparency International's Corruption Index observes that corruption is perceived to be more prevalent in less developed countries.¹⁹⁶ As previously mentioned, these statistics only address bribes that were successfully prosecuted. This finding highlights the role of detection and enforcement resources in revealing corruption and underscores the benefits of involving additional market participants and gatekeepers to assist in uncovering corrupt business practices.

The sources through which these bribes were discovered highlight the importance of an effective gatekeeper regime as well as the opportunities for enhanced incentives for whistleblowers. Recognizing the prominent role of gatekeepers such as auditors, financial advisors, and lawyers in uncovering

190. *Ibid* at 8-9.

191. *Ibid* at 9.

192. *Ibid*.

193. Alexander Dyck, Adair Morse & Luigi Zingales, "Who Blows the Whistle on Corporate Fraud?" (2010) 65:6 J Fin 2213 at 2214. Note that this statistic pre-dates the introduction of whistleblower rewards under the *Dodd-Frank Act*. See *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, §922, 124 Stat 1376 at 2223.

194. *Ibid* at 2245. Whistleblowers of corporate fraud may face significant professional and personal consequences. However, *qui tam* legislation, which provides whistleblowers on domestic frauds against the US government with rewards of 15-30 per cent, has significantly increased the number of whistleblowers who are willing to disclose frauds against government.

195. OECD, *Foreign Bribery Report*, *supra* note 199 at 29-30.

196. See generally United Nations Development Programme, "Table 1: Human Development Index and its components" (2014), online: UNDPOR <<http://www.hdr.undp.org/en/content/table-1-human-development-index-and-its-components>>; Transparency International, "Corruption Perceptions Index 2013" (2013), online: <http://issuu.com/transparencyinternational/docs/cpi2013_brochure_single_pages/1?e=2496456/5813913>.

instances of corruption, regulatory structures should be designed to capitalize on their unique position and increase their opportunities to uncover corruption. To this end, and given that traditional law enforcement may be limited by the fact that much of the evidence regarding the acts of corruption is located outside of their jurisdiction, gatekeepers must play a particularly prominent role in uncovering corruption and encouraging companies to take appropriate actions. The OECD's report provides valuable assistance on the types of transactions and foreign public officials most frequently engaged in corruption. Public procurement is the most common subject of bribes, accounting for 57 per cent of all sanctioned transactions, followed by customs clearance with 12 per cent of sanctions.¹⁹⁷ Additionally, officials within state-owned enterprises are the most common recipients of bribes, receiving 80 per cent of sanctioned payments.¹⁹⁸ This information provides a starting point for auditors and other gatekeepers to develop and implement controls designed to reduce opportunities for bribery in these circumstances, to detect non-compliance, and to identify effective subsidiary-governance policies. However, the report also highlights how important it is for gatekeepers to acquire a keen understanding of the operations of their client and the markets in which they operate, since 41 per cent of bribery cases involve local agents and an additional 35 per cent of cases involve the use of corporations or consultancy arrangements designed to obscure the nature of the relationship or transaction.¹⁹⁹

Among the signatories to the OECD Anti-Bribery Convention, the United States has been the most active, having issued sanctions in relation to 128 separate instances of bribery. By contrast, Germany issued sanctions in relation to twenty-six separate schemes, Korea to eleven, and the United Kingdom, Italy, and Switzerland to six separate schemes.²⁰⁰ Although Canadian enforcement activity lags behind that of the United States, the four schemes sanctioned by Canadian authorities are not dissimilar to the enforcement activity of other similarly situated countries.²⁰¹

197. OECD, *Foreign Bribery Report*, *supra* note 199 at 32.

198. *Ibid* at 25.

199. *Ibid* at 8.

200. *Ibid* at 9.

201. When deflated to consider the number of enforcement actions for per 1 trillion USD in 2013 GDP, both Korea (8.44) and Switzerland (16.06) have greater enforcement intensity than the United States (7.633). Canada had 2.19 enforcement actions per 1 trillion USD in 2013 GDP, the United Kingdom had 2.38/1 trillion USD and Germany had 7.15/1 trillion USD. See The World Bank, "GDP at market prices (current US\$)" (2016), online: <<http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>>.

Finally, criminal and civil fines are the most common form of punishment for foreign corrupt practices,²⁰² reflecting hesitancy on the part of regulators to use more progressive, alternative forms of punishment designed to encourage long-term compliance. Over the past five years, criminal and civil fines levied against offenders have averaged approximately 15.3 million USD.²⁰³ Although the mean average may be distorted by outlier fines, this figure provides support for the general observation that, despite the growth in recent fines, Canadian sentencing of foreign corrupt practices is less punitive than other jurisdictions.

Global foreign corrupt practices enforcement trends reflect a general hesitancy among developed nations to be aggressive in prosecuting corruption. Heightened international cooperation in the detection, investigation, and prosecution of foreign corrupt practices may be necessary in order to increase the regulatory capacity of these jurisdictions. When corruption is identified, countries appear most comfortable utilizing criminal or punitive civil sanctions to discipline individuals or corporations found to have engaged in corrupt practices. Although punitive sentences may have a deterrent effect, they lack the progressivity necessary to foster a comprehensive regulatory regime. Many businesses at risk of foreign corrupt practices may operate in multiple jurisdictions; further harmonization of the anti-corruption regulatory regimes around the world may provide the foundation and critical mass of regulatory actions necessary to develop an effective regulatory pyramid.

III. PROPOSALS FOR DEVELOPING A COMPREHENSIVE REGULATORY REGIME FOR REDUCING THE SUPPLY OF BRIBES TO FOREIGN PUBLIC OFFICIALS

Corruption impacts at least two dimensions of economic development and competition. Domestically, corruption impedes social mobility and the efficient allocation of capital. Internationally, it allows the provider of bribes to gain an unfair and unequal regulatory advantage over its competitors. To the extent that there is inequality in the intensity, effectiveness, and treatment of corruption across multiple jurisdictions, corporations may be able to gain an unfair competitive advantage by operating out of jurisdictions where corruption is less stringently regulated. Conversely, consistent regulatory intensity, effectiveness, and treatment across suppliers of corrupt payments to foreign public officials have

202. OECD, *Foreign Bribery Report*, *supra* note 199 at 18.

203. *Ibid* at 13, 20.

the potential to level the playing field and to reduce the need for corporations to pay bribes to remain competitive. Recognition of the benefits of collective action has been the driving force behind OECD and UN conventions on corruption.²⁰⁴ However, the benefits of collective action must be realized through independent measures by all signatory countries to implement agreed-upon principles and best practices through domestic legislation and enforcement.

Canada's record on implementing UN and OECD recommendations has been poor. In its 2011 *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada*, the OECD Working Group on Bribery observed that "significant concerns ... remain about Canada's framework for implementing the Convention."²⁰⁵ The report highlighted awareness of the *CFPOA*, internal compliance programs, and voluntary disclosure of violations as areas in which Canada lags behind.²⁰⁶ Part III discusses the essential role played by internal controls, which prevent corruption from within corporations, in addressing the occurrence of foreign corrupt practices. We propose that Canadian corporate and securities law be used to provide a foundation for a regulatory pyramid that incentivizes the development of internal controls within firms and that employs progressive sanctions to act as a disincentive to corrupt practices at all levels.

Although the regulation of bribery of foreign public officials reduces the incentives to provide corrupt payments, it does not correspondingly reduce the incentives for public officials to solicit bribes. John Brademas and Fritz Heimann note that, absent social and political reforms in the recipient jurisdiction, "[t]he demand side—extortion and other forms of corruption by public officials—is more difficult to target effectively" since laws prohibiting officials from taking bribes are unlikely to be enforced.²⁰⁷ Moreover, the ability of corporations to comply with applicable legislation may be challenged when they undertake business operations in jurisdictions where corruption is commonplace.²⁰⁸ The difficulties of asymmetrical regulation highlight the need for sophisticated regulatory structures to incentivize compliance and sanction corruption at all levels within supply-side jurisdictions.

When domestic foreign corrupt practices legislation functions effectively, it can be regarded as a stopgap measure that enables jurisdictions to undertake the "wholesale change necessary" to combat corruption domestically and remove

204. *Inter-American CAC*, *supra* note 65 at para 5.

205. *Phase 3 Report*, *supra* note 83 at 5.

206. *Ibid* at 60, 61.

207. Brademas & Heimann, *supra* note 2 at 21.

208. Randall, *supra* note 9 at 673.

public officials who solicit bribes.²⁰⁹ While these changes are underway, foreign corrupt practices legislation must create sufficient disincentives to discourage businesses from providing illegal payments to foreign public officials and must incentivize these corporations to publicly identify, investigate, and respond to acts of corruption by their employees. Though foreign corrupt practices legislation must be sophisticated to reduce the supply of bribes, the sanctions used must also be proportionate. Countries must be careful not to increase the regulatory risk associated with operating in these jurisdictions to such an extent that businesses forego foreign investment altogether. The resulting reduction in international activity and foreign investment could harm the recipient state more than the corrupt practices being targeted.

What is needed is a mix of targeted regulatory sanctions that draws from all levels of the regulatory pyramid, including corporate-governance-based solutions to incentivize compliance, private and public monitoring and enforcement mechanisms, fines, and, where appropriate, adequate prison sentences that address corruption at all levels of the supply chain. It may not be sufficient to target only the high profile, brazen instances of bribery committed by senior corporate officials within a corporation or the payments made to senior public officials. Focusing enforcement at this level may ignore corruption at lower levels within corporations and state bureaucracies, as well as payments of smaller amounts. When anti-corruption initiatives only target one level of corruption, prevailing cultural and institutional pressures persist, enabling corruption to re-emerge when targeted enforcement efforts are scaled back.²¹⁰

The lack of a correlation between enforcement actions and a firm's perception of the risk of violations being identified in its operations underscores the need for and role of internal controls in informing and guiding an entity's perception of regulatory risk. Once the initial deterrent effect of a newly enacted regulatory regime is attained, internal controls developed to implement these regulations provide the supplemental supports necessary to ensure effective compliance.²¹¹ Analysis of jurisprudence under the *CFPOA* has highlighted the important role of corporate-compliance regimes in uncovering, reporting, and responding to foreign corrupt practices. However, given that much of the corruption successfully

209. Brademas & Heimann, *supra* note 2 at 21.

210. Ksenia, *supra* note 70 at 226 (noting that, for instance, corruption levels quickly escalated to prior levels in Hong Kong and Pakistan because these programs failed to address corruption at all levels of government).

211. Neil A Gunningham, Dorothy Thornton & Robert A Kagan, "Motivating Management: Corporate Compliance in Environmental Protection" (2005) 27:2 Law & Pol'y 289 at 294-95.

prosecuted in Canada to date was discovered through voluntary disclosure made by the impugned corporations following an internal investigation, it may also be inferred that a significant volume of offending conduct is continuing undetected due either to inadequate detection mechanisms within the subject firm or to its unwillingness to publicly disclose such conduct. Unlike the American and British legislation, the *CFPOA* does not include any mechanisms to promote the development of internal compliance and voluntary disclosure. Recognizing this gap, a fundamental mechanism for addressing corruption should be the development of regulation that requires or incentivizes corporations to develop internal controls capable of identifying and responding to illegal conduct within the firm. Applying Ayres and Braithwaite's regulatory pyramid, regulations designed to facilitate the development of internal controls should focus on promoting compliance by market participants.

A. INTERNAL CONTROLS: PREVENTING CORRUPTION FROM WITHIN THE CORPORATION

To understand how Canadian corporate and securities law can be used to round out the Canadian regulatory framework by promoting internal controls within corporations, it is first necessary to have an understanding of the form these internal controls might take. It is important to recognize that the form and complexity of internal controls to prevent corruption should and will vary widely depending on the size of the firm, the industry it operates in, and the type and level of corruption risk its business presents.²¹² The Canadian corporate landscape is extremely diverse. Canadian business is broadly diversified across a range of industries, including mining and natural resource extraction, finance, farming, and manufacturing. Firm sizes in Canada also differ widely, with businesses with over 500 employees accounting for 45.7 per cent of GDP and small- and medium-sized businesses accounting for 54.3 per cent of GDP in 2005.²¹³ This heterogeneity of Canadian business corporations suggests that a one-size-fits-all approach to regulating foreign corrupt practices may be impractical and militates

212. *FCPA Guide*, *supra* note 145 at 56.

213. Danny Leung, Luke Rspoli & Rob Gibson, "Small, Medium-sized and Large Businesses in the Canadian Economy: Measuring Their Contribution to Gross Domestic Product from 2001 to 2008" in Statistics Canada, *Economic Analysis Research Paper Series* (Ottawa: Statistics Canada, 2011) at 10, online: <<http://www.statcan.gc.ca/pub/11f0027m/11f0027m2012082-eng.pdf>>.

in favour of a principles-based approach to regulating corporations.²¹⁴ In this context, it would be inadvisable and inconsistent with Canada's approach to corporate law to recommend that Canadian companies be mandated to implement specific internal control mechanisms. Nonetheless, it is possible to identify three broad categories of internal control mechanisms that should be promoted within Canadian corporations.

The development of internal controls designed to address corruption risk within an organization can be structured first, around the board of directors; second, around the development of an enterprise-wide culture of compliance; and third, around internal policies and enforcement mechanisms. Just as the board of directors provides central accountability and direction to the corporation, the development of a system of internal controls should originate at the board level.²¹⁵ Ensuring adequate diversity and experience on the board and committees responsible for developing such internal controls is critical.²¹⁶ As previously discussed, one of the principal challenges associated with developing a regulatory response to foreign corrupt practices is understanding and accounting for the diverse cultural, social, and regulatory factors that influence a corrupt transaction. To this end, ensuring a diverse board will assist in evaluating the variety of risk factors that the company may face. As will be explored in more depth in Part III(B), below, risk management forms the essence of directors' duties to the corporation.²¹⁷ The "tone at the top" with respect to corruption also plays a vital role in discouraging corrupt practices throughout the organization.²¹⁸

Transparency and accountability are fundamental to mitigating the risk of corruption. In particular, the *FCPA Guide* underscores the importance of maintaining books, records, and accounts that reflect the assets and transactions

214. Richard Bosc, Mohamed Dia & Yves Bozec, "Corporate Ownership and Governance Practices in Canada: A Longitudinal Study" (2013) 4:1 *Int'l J Corp Governance* 51 at 53 (noting that Canada has traditionally favoured principles-based regulation whereas the United States has generally gravitated towards a more rules-based regulatory model).

215. Barry Reiter, *Directors' Duties in Canada*, 5th ed (Toronto: CCH Canadian Limited, 2012) at 823-24.

216. See Christopher S Armstrong, John E Core & Wayne R Guay, "Do Independent Directors Cause Increases in Firm Transparency?" (2014) 113:3 *J Fin Econ* 383; Jayanthi Krishnan, Yuan Wen & Wanli Zhao, "Legal Expertise on Corporate Audit Committees and Financial Reporting Quality" (2011) 86:6 *Acct Rev* 2099; Jeffrey R Cohen, "The Effect of Audit Committee Expertise on Monitoring the Financial Reporting Process" (2014) 89:1 *Acct Rev* 243.

217. Reiter, *supra* note 225 at 822.

218. *Ibid.*

of the issuer and ensure that the funds are, in fact, utilized for such purpose.²¹⁹ As well, in concert with the board, a code of conduct specifically addressing foreign corrupt practices should be developed that outlines employees' responsibilities and establishes a confidential whistleblowing hotline for employees, contractors, and other stakeholders to report suspected instances of corruption anonymously to management.²²⁰ The code should be accessible to employees and other stakeholders in a variety of languages and formats, contemplate a wide variety of scenarios and types of payments, and provide a clear accountability framework that can assure all parties subject to the policy that any instances of wrongdoing will be dealt with expeditiously. Such accountability mechanisms should employ both internal and external monitors to ensure that they are properly implemented.

Finally, the development of internal anti-corruption policies and procedures should be complemented by educational curricula designed to foster a culture of compliance within all levels of the firm. Educational initiatives should promote a clear understanding of the risks for and appropriate responses to solicitations to engage in corrupt conduct, with particular emphasis on how perceptions of corruption differ across cultures. Policies, procedures, and educational programs should be clearly communicated within the organization and embodied by the conduct of management at all levels.²²¹

B. DIRECTORS' DUTIES: CORPORATE LAW AS A TOOL TO PROMOTE THE DEVELOPMENT OF ANTI-COMPLIANCE REGIMES

A director's duty to supervise the operation and management of the corporation provides a useful mechanism for promoting enhanced compliance.²²² Directors owe a duty of care that requires them to act in a careful and informed manner and to exercise the care, diligence, and skill of a reasonably prudent person in comparable circumstances.²²³ They also have a fiduciary duty to act in the best interests of the corporation.²²⁴ In order to discharge these duties, directors have an obligation to identify and mitigate risks, typically through the development of a system of internal controls.²²⁵ Canadian courts generally rely on the presence or

219. *FCPA Guide*, *supra* note 145 at 58; Samuel B Richard, "To Bribe a Prince: Clarifying the Foreign Corrupt Practices Act Through Comparisons to the United Kingdom's Bribery Act of 2010" (2014) 37:2 BC Int'l & Comp L Rev 419 at 423.

220. *FCPA Guide*, *supra* note 145 at 57.

221. *Ibid* at 57-59.

222. *Canada Business Corporations Act*, RSC 1985, c C-44, ss 102, 158 [CBCA].

223. *Ibid*, s 122.

224. *Ibid*.

225. Reiter, *supra* note 225 at 823.

absence of a proper process to evaluate whether directors have satisfied their duty of care.²²⁶ Although courts will not attempt to second-guess or substitute their own judgment for that of the board of directors, the development of an effective process by the board serves as a proxy for quality decision making.²²⁷ When applied to the issue of foreign corrupt practices, it is conceivable that where a corporation faces risk of its employees providing illegal bribes, its directors already owe a duty to take reasonable steps to mitigate such risks and could be held liable, as a matter of corporate law, for their failure to respond to corruption risk. Judicial recognition of such a duty would provide a powerful incentive for boards to develop and monitor internal-compliance mechanisms designed to mitigate corruption risk.

Courts are becoming increasingly attuned to the relationship between effective risk-management controls and the fiduciary duties of directors. In particular, in the United States, courts have increasingly begun to impose liability where directors have failed to implement reasonable safeguards to mitigate identified risks or have failed to turn their mind to such risk factors altogether.²²⁸ Delaware courts have imposed a high burden for establishing liability where a board has failed to turn its mind to or has neglected significant risk factors. However, recognition of directors' duties to implement risk-management strategies nonetheless provides a promising tool for allowing shareholders to hold directors accountable when corruption risks are unreasonably overlooked. Recognizing a similar doctrine in Canada could provide the necessary foundation for ensuring that directors have a positive obligation to address the risk of foreign corrupt practices within their organization. Judicial recognition of a director's duty to address this risk could provide a simple yet effective mechanism for ensuring corporations begin to take steps to address corruption risk while not requiring a legislative amendment to the *CFPOA*.

The duty to address risks stemming from corruption is arguably already a part of directors' duties to act with reasonable care and in the best interests of the corporation. However, clearly establishing this area of responsibility through case law will take time, persistent efforts on the part of plaintiffs' counsel, and the serendipitous union of favourable facts with a sympathetic judge. For this reason, the evolution of directors' duties has in some instances been driven by

226. *Brant Investments Ltd v KeepRite Inc*, (1991) 3 OR (3d) 289, 80 DLR (4th) 161 (Ont CA).

227. *Ibid.*

228. *In re Caremark International Inc Derivative Litigation*, 698 A2d 959, 971 (Del Ch 1996); *In re Citigroup Inc Shareholder Derivative Litigation*, 964 A2d 106 (Del Ch 2009); *American International Group, Inc Consolidated Derivative Litigation*, CA No 769-VCS (Del Ch 2009).

legislation. For instance, amendments to employment standards and business corporations statutes have been used to establish personal liability of directors for debts to employees of the company, in the event that the company is unable to pay, up to the amount of six months' wages.²²⁹ Legislation has also been used to articulate directors' duties under Ontario's *Environmental Protection Act*, which provides that directors have a positive duty to take all reasonable care to prevent the unlawful discharge of contaminants into the environment and to ensure the Ministry of the Environment is notified in the event that such discharge occurs.²³⁰ A similar legislative amendment requiring directors to take all reasonable steps to address corruption risk within the corporation may provide faster and more stable grounds for using directors' duties and personal liability to motivate the development of internal controls to prevent corruption in Canada.

Whether it is achieved through judicial decision making or legislative amendment, the development of directors' duties to address corruption risks provides an attractive mechanism to motivate boards to implement anti-corruption programs. The civil liability of directors provides a particularly attractive regulatory tool in that enforcement costs are born not by the state but rather by the stakeholders who suffer losses as a result of corruption.

C. CORPORATE GOVERNANCE: THE ROLE OF AUDITORS IN CORRUPTION DETECTION

Corporate law practice and jurisprudence have imposed strong pressure on corporations to formalize their risk-management and governance processes through the development of a series of internal controls designed to monitor and manage identified risk factors.²³¹ Directors' obligations to mitigate risks within the corporation and develop strategies to respond to them are often fulfilled with the aid of the firm's auditor, particularly in areas of high audit risk. The audit committee of the board of directors, in conjunction with the corporation's external auditors, serves a critical role in developing, monitoring, and enforcing

229. See Reiter, *supra* note 225 at 605; *CBCA*, *supra* note 228, s 119.

230. See Reiter, *supra* note 225 at 852-65; *Environmental Protection Act*, RSO 1990, c E 19, s 194.

231. See Lawrence A Cunningham, "The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills" (2004) 29:2 J Corp L 267 at 271-72.

internal controls designed to ensure compliance with the myriad of applicable regulatory regimes.²³²

All public corporations are required to maintain an audit committee of not less than three directors, the majority of whom must be independent from the corporation.²³³ This independence allows audit committees to evaluate areas of particular audit risk, develop policies and controls designed to address such risk factors, and, in concert with the corporation's internal and external auditors, evaluate the efficacy of these controls. In doing so, the audit committee is uniquely positioned to identify corruption risk and will generally possess the expertise to effectively evaluate these areas of concern.²³⁴ Incorporating analysis of corruption risk into the mandate of an audit committee could thus provide a strong mechanism for ensuring that foreign corrupt practices are treated with the same seriousness as other financial reporting matters within the corporation.

The International Standards for the Professional Practice of Internal Auditing establish a series of standards relating to fraud within an organization, which includes the provision of illegal payments through bribery and corruption. Central to these controls is the tone set by management and the board with respect to governance processes, corporate conduct, policies and procedures, and risk management. As previously discussed, vicarious liability for the corrupt practices of agents and employees of the corporation can serve as a powerful incentive for the board and management to provide the leadership and direction necessary for a business to respond to corruption and bribery in an organized and cohesive manner. This central leadership is reinforced and fortified by the work of the audit committee. Internal auditors are responsible for exercising due professional care to evaluate the potential for the occurrence of fraud across various parts of a business. When fraud, including foreign corrupt practices,

232. See generally Ontario Securities Commission, *National Instrument 51-102: Continuous Disclosure Obligations* (21 January 2011), online: <https://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20111031_51-102_unofficial-consolidation-post-ifrs.pdf> [NI 51-102]. Specific regulatory tools, including sanctions for failing to develop a system of adequate internal controls, the introduction of a corporate due diligence defence to liability or leniency on sentencing are discussed in Part III(D), below. See also Christie L Ford, "New Governance, Compliance and Principles-Based Securities Regulation" (2008) 45:1 Am Bus LJ 1 at 25. Ford suggests that a "principles-based model permits firm innovation in compliance processes, allowing firms to sharpen their compliance practices and procedures without fear of violating detailed, and potentially anachronistic and less effective regulatory requirements."

233. *CBCA*, *supra* note 232, s 171; *NI 51-102*, *ibid.*

234. *NI 51-102*, *supra* note 242, s 3.8 (requiring that directors appointed to an audit committee be financially literate or become financially literate within a reasonable period of time).

occurs, internal auditors also play an essential role in identifying and responding to such conduct.²³⁵

The traditional role of auditors is to review the accuracy of financial statements to ensure that the company and shareholders are not misinformed as to the company's current financial position. The use of internal and external audit services to address corrupt payments faces challenges. In contrast to fraud, corrupt payments or bribes are not necessarily detrimental to the short-run performance of the business or to the interests of shareholders.²³⁶ Consequently, the traditional role of auditors does not appear to apply to the same extent with corrupt payments that may not have a material impact on the profitability or cash flow of the company or that may, alternatively, be fully reflected in the financial statements under a catch-all line-item. The losers in this instance are the citizens of the country where the bribe is received and not necessarily the business providing the illegal payment. However, the skill set of auditors acquires renewed value when they are required to assess and comment upon the efficacy of internal controls designed to mitigate corruption risk within an organization.

Audit services traditionally operate by testing internal controls to ensure the absence of material misstatements in financial reporting. Consequently, to the extent that bribes are properly accounted for in an issuer's financial statements and that the payment of such bribes does not constitute a failure of a risk-management procedure or internal financial control, auditors are thus under no obligation to report these payments to authorities or withhold their audit opinion if they uncover instances of foreign corrupt practices.²³⁷ Alternatively,

235. The Institute of Internal Auditors, *International Standards for the Professional Practice of Internal Auditing (Standards)* (United States: The Institute of Internal Auditors, 2012), ss 1120, 2060, 2120.

236. Muhammad Akram Khan, "Role of Audit in Fighting Corruption" (Paper delivered at the ad hoc meeting of Ethics, Integrity, and Accountability in the Public Sector: Re-building Public Trust in Government through the Implementation of the UN Convention against Corruption, St. Petersburg, Russia, 26-27 September 2006) at 3.

237. *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 67(5). According to this section, companies are not permitted to deduct, for income tax purposes, "an outlay made or expense incurred for the purpose of doing anything that is an offence under section 3 of the Corruption of Foreign Public Officials Act." Consequently, the presentation of accounts used for the purposes of bribing foreign public officials must be categorized under one of the prescribed International Financial Reporting Standards headings when maintained by a parent corporation. If these accounts are miscategorised or misrepresent the nature of the payments, the auditors may be under an obligation to withhold their audit opinion. However, when these accounts are maintained by an unconsolidated subsidiary in which the parent holds a non-controlling interest, the existence of these accounts does not affect the accountancy of the parent. As a result, auditors reviewing such accounts are under no obligation to withhold

when the payment of these bribes involves multiple authorities within the corporation, it may not be possible for the auditor to identify any improprieties in the transactions in the first instance. This risk is compounded by traditional audit practices that discourage auditors from going “beyond the books.”²³⁸ Consequently, regulatory effectiveness stands to benefit from increased publicity and scrutiny of the foreign practices of Canadian businesses through traditional government regulatory channels (by way of enforcement and ongoing dialogue as well as non-governmental organizations).

Effective gatekeeper regimes and compliance structures depend on a clear understanding of the nature of foreign corrupt practices and the steps that businesses can take to reduce the risks of employees engaging in these practices. In addition to empowering gatekeepers and introducing multiple layers of controls, Canada’s regulatory regime would be strengthened by a stronger dialogue between both criminal and civil regulators and businesses engaged in commerce in jurisdictions with high corruption risk. This would require moving the *CFPOA* beyond a purely criminal law statute to encompass broader aspects of international trade and commerce. To this end, it is suggested that the Canadian government adopt the American or British model for requiring corporations to develop adequate internal controls to address corruption risk within their business.

D. SECURITIES LAWS: USING MANDATORY DISCLOSURE AS A CATALYST FOR BEHAVIOURAL REFORMS

Securities law disclosure provides an alternate mechanism that could help promote enhanced compliance and the development of a system of progressive regulation. Canadian securities laws operate to protect investors, enhance the efficiency of the Canadian capital markets, and promote confidence in the market. Reporting issuers are obligated to provide “full, true and plain disclosure of all material facts” in any offering materials.²³⁹ Put in another way, they must provide the

their audit opinion and the appropriate response by the parent corporation would be to address the payments as an internal corporate governance matter rather than audit matter. Applicable risk factors relating to the potential detection of such an account would be addressed by the corporation in its Management Discussion & Analysis, provided pursuant to Ontario Securities Commission, Form 51-102F1. However, such disclosure would not be present in private companies and is not subject to external review by the corporation’s auditors. Consequently, absent voluntary disclosure by the issuer, there is no mechanism for revealing the existence of such accounts or transactions.

238. Khan, *supra* note 246 at 5-6.

239. *Securities Act*, RSO 1990, c S-5, s 56(1).

marketplace with information that would affect the share price or affect the investment decision of a reasonable investor. Expanding the interpretation of these general tests to require disclosure of corruption risks and anti-corruption policies would introduce a new governance mechanism designed to make issuers more responsive towards and more accountable for corruption risk within their firms. An alternative approach would have the same effect: A specific disclosure requirement could be introduced for anti-corruption measures. Where issuers misrepresent the robustness of their internal compliance regimes, either approach would facilitate private securities enforcement.²⁴⁰

Canadian securities laws do not currently impose a specific requirement on reporting issuers to disclose the policies and controls they have designed to address foreign corrupt practices, though such issues may be captured within a corporation's audit policies. Corporations are not required to specifically discuss, in their securities law disclosure, the controls they have developed to mitigate the risk of foreign corrupt practices. In the absence of specific regulatory guidance or case law stating that such disclosure is material, reporting issuers are generally reluctant to provide positive disclosure since it may ultimately provide a clear basis for liability if the issuer fails to satisfy the standards articulated therein.

It has been argued in the context of corporate social and environmental matters that a specific securities rule requiring mandatory disclosure was necessary to ensure that issuers would provide full disclosure.²⁴¹ As a result, securities regulators have taken positive steps to provide guidance to reporting issuers on the nature and scope of the environmental, human rights, and corporate social responsibility disclosure required under the general disclosure requirements.²⁴² Although regulators have indicated that this guidance "does not create any new legal requirements,"²⁴³ the tacit recognition that such disclosure may be material lends credibility and may facilitate broader disclosure of these issues.²⁴⁴

240. Aaron A Dhir, *Challenging Boardroom Homogeneity: Corporate Law, Governance, and Diversity* (New York: Cambridge University Press, 2015) at 84, 95-98. See also Cynthia Williams, "The Securities and Exchange Commission and Corporate Social Transparency" (1999) 112:6 Harv L Rev 1197 at 1269 (citing Justice Brandeis who viewed disclosure as a remedy to "social and industrial disease" with "sunlight ... [being] one of the best disinfectants").

241. *Ibid.*

242. See *Environment Reporting Guidance*, CSA Notice 51-333 (27 October 2010) [CSA 51-333]; *Information Required in a Prospectus*, BCSC Form 41-101F1, ss 5.1(4), 21.1(1).

243. *Ibid.* at 1.

244. Toronto Stock Exchange & Chartered Professional Accountants of Canada, "A Primer for Environmental & Social Disclosure" (March 2014) at 3, 11-13, online: <www.cpacanada.ca/primer>.

As well, to leave no doubts about public companies' mandatory disclosure obligations, securities regulators have clarified particular items that must be disclosed. For example, reporting issuers are now required, in their annual information forms, to disclose the impact of environmental regulation on a company's operations and describe fundamental environmental and social policies "within the communities in which it does business."²⁴⁵

Mandatory disclosure has the capacity to promote a culture of compliance, thereby shifting a portion of the burden associated with enforcing the anti-corruption regulations onto market participants.²⁴⁶ Expanding or clarifying securities law disclosure requirements to obligate issuers to provide disclosure regarding their foreign corrupt practices compliance risk and internal controls would provide a powerful incentive for management and the board to evaluate existing controls, identify potential risks, and ensure that their policies are implemented in a manner consistent with the company's public disclosure. In this manner, the act of disclosure per se can promote greater awareness among management and directors of a corporation, thereby facilitating a positive behavioural shift in line with the regulator's goals.²⁴⁷ Moreover, establishing public-disclosure requirements for publicly listed companies may have positive spinoff benefits for the recognition of directors' duties to take reasonable steps to address foreign corrupt practices. In particular, such disclosure may assist in making foreign corruption risk a commonplace element of the duties of directors of multinational corporations.

Secondly, this disclosure provides a mechanism for private enforcement if a company misrepresents the quality of its internal controls. As noted in this section, above, reporting issuers are obligated to provide "full, true and plain disclosure of all material facts" in any offering materials.²⁴⁸ To the extent that any

245. *Annual Information Form*, BCSC Form 51-102F2 (11 April 2012). See also Ontario Securities Commission, News Release, 51-716, "Environmental Reporting" (29 February 2008), online: <https://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20080229_51-716_enviro-rpt.pdf> (noting that existing environmental disclosure is generally inadequate and that companies should provide more detailed information on the scope of their existing compliance programs, including the cost thereof and how internal policies impact the issuer's operations).

246. See Mary Condon, "Rethinking Enforcement and Litigation in Ontario Securities Regulation" (2006) 32:1 *Queen's LJ* 1 at 30-32, citing Neil A Gunningham & Robert A Kagan, "Regulation and Business Behavior" (2005) 27:2 *Law & Pol'y* 213 at 215 (arguing that the actions required for compliance with the regulations themselves promote a culture of long-term compliance rather than reactive short-term responses to regulatory enforcement actions).

247. Dhir, *supra* note 250 at 98.

248. *Securities Act*, *supra* note 249, s 56(1).

issuer misrepresents such a material fact either by making an untrue statement or failing to state a material fact that is necessary to ensure that a statement is not misleading in the circumstances,²⁴⁹ the issuer may face primary- or secondary-market liability.²⁵⁰ The threat of a securities class action resulting from a misrepresentation can provide a powerful deterrent, promote accountability, privatize a portion of the investigative and regulatory costs associated with a particular issue, and provide a behavioural catalyst for reporting issuers.²⁵¹ In doing so, private securities law enforcement provides an additional layer of gradation on the regulatory pyramid between a purely compliance-based regulatory framework and criminal enforcement under the *CFPOA*.

Canadian private regulation of foreign corrupt practices is in its early stages. To date, the Canadian class action bar has been reluctant to maintain claims against companies engaged in foreign corruption. However, an ongoing claim against SNC-Lavalin for \$1 billion in damages has the potential to expand the regulatory scope of the Canadian anti-corruption regime.²⁵² In this action, the plaintiffs claim that SNC-Lavalin and its officers and directors should be liable for damages resulting from corrupt payments made in contravention of SNC-Lavalin's internal policies and public statements. In particular, in these statements, SNC-Lavalin maintained that it was a "socially responsible company" and had properly operating controls, policies, and practices sufficient to ensure compliance with the standards articulated therein.²⁵³ As a result of these alleged misrepresentations, SNC-Lavalin's financial statements are alleged to have been materially false or misleading and to have exposed SNC-Lavalin to material risks of criminal and regulatory actions and severe reputational damages that have "compromised SNC's ability to procure new business, particularly in developing countries."²⁵⁴

Although the SNC-Lavalin class action has not yet proceeded to trial, it represents a novel foray into a new sphere of foreign corrupt practices private litigation in Canada. To this end, private enforcement of anti-corruption governance standards has the potential to expand significantly the scope and character of Canada's foreign corrupt practices regime. Moreover, the prospect of

249. *Ibid.*, s 1(1) (defining "material fact" and "misrepresentation").

250. *Ibid.*, ss 130-38.

251. Elizabeth Chamblee Burch, "Securities Class Actions as Pragmatic *Ex Post* Regulation" (2008) 43:63 Ga L Rev at 67, 70.

252. The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund and 0793094 Ltd v SNC-Lavalin Group Inc et al, 2015 ONSC 256, 124 OR (3d) 368.

253. *Ibid.* at para 21.

254. *Ibid.*

potential securities law liability for corporate governance disclosure should serve to caution directors and officers of reporting issuers that the failure to ensure internal conduct accurately reflects such disclosure may provide the basis for future securities litigation.

E. COMMUNICATION BETWEEN REGULATORS AND MARKET PARTICIPANTS

Finally, Canada's anti-corruption regime would benefit from the development of regulations and guidance documents designed to assist corporations and individuals engaged in business abroad in understanding their obligations under the *CFPOA*. In particular, the US guide details the factors to be considered by the SEC and DOJ when considering whether to open an investigation or bring charges under the *FCPA*—including whether the alleged act is widespread within the industry, as well as the extent to which the target of the investigation has made timely disclosure of the conduct and cooperated with the SEC or DOJ's inquiries as they relate to both civil and criminal investigations.²⁵⁵ The guide also provides a series of factors to be applied by the SEC and DOJ and considered by corporations in adopting a corporate-compliance program, including the importance of buy-in from senior management and the development of a corporate culture that discourages offending conduct.²⁵⁶ To this end, the guide highlights the need for effective and independent oversight mechanisms capable of fully assessing risk factors within the organization as well as the need for training offered to employees and the use of positive incentives and negative deterrents.²⁵⁷ Similarly, the United Kingdom's Ministry of Justice produces a guidance document for the UK *Bribery Act*. This guidance document addresses the relevant procedures that corporations can put into place to discharge their obligation to develop a corporate compliance program under the legislation.²⁵⁸ These guidance documents could serve as a template for Canadian officials in developing a more robust regulatory framework designed to promote compliance and to address the risk of corruption by Canadian businesses through proactive compliance measures.

255. *FCPA Guide*, *supra* note 145 at 52-54.

256. *Ibid* at 56-57. The guide urges companies to move beyond a "check-the-box" approach to corporate compliance to consider factors specific to the company's needs, risks and particular challenges.

257. *Ibid* at 58-59.

258. "Bribery Act 2010," *supra* note 98.

IV. CONCLUSION

Strengthening Canadian regulation of foreign corrupt practices will promote sustainable economic development abroad and provide long-term stability and legal certainty for Canadian multinational corporations. In the absence of effective regulation, the immediate business advantages to be gained through bribery lead many organizations to favour short-term profit over sustainable growth. This problem is compounded by the difficulties inherent in detecting and investigating corrupt business practices abroad that make the discovery of any given bribe unlikely. Yet in aggregate, corrupt business practices destabilize foreign jurisdictions, resulting in the loss of profits and opportunities for the businesses operating within them. Overcoming this collective action problem requires a strong anti-corruption scheme designed to reduce the supply of Canadian corporations willing to participate in bribery abroad.

A comparison of the *CFPOA* with the corresponding British and American legislation demonstrates the benefits of making use of the full regulatory pyramid, from high-profile criminal prosecutions to lower-level civil fines, to address the supply side of corruption. Criminal provisions play an important role at the apex of this scheme. Consequently, development of more consistent sentencing under the *CFPOA* and a greater willingness to hold the orchestrators of bribes—rather than their corporations or intermediaries—accountable will help strengthen Canada's anti-corruption regime. The ability to hold corporations vicariously liable for bribery on the part of their employees, present under the British and American legislation, is also essential. Limiting liability to the actions of a rogue employee when those actions were facilitated by a permissive corporate culture allows the underlying cause of corruption to remain unchecked. The introduction of a vicarious-liability provision into the *CFPOA*, prosecution of all responsible parties, and increased consistency in sentencing will strengthen the top of the regulatory pyramid of Canada's anti-corruption regime.

The criminal provisions are vital, however, due to the enforcement difficulties discussed; criminal prosecution alone does not effectively motivate corporations to take action to ensure that their executives and employees do not participate in bribery. Twice as many corruption schemes are revealed worldwide by companies themselves as are detected by law enforcement.²⁵⁹ As such, failing to recognize the unique ability of corporations to prevent and detect corruption internally significantly limits the capability and effectiveness of an anti-corruption regime.

259. OECD, Foreign Bribery Report, *supra* note 199 at 15.

The Canadian anti-corruption framework could be vastly improved through the implementation of measures designed to motivate corporations to develop a culture of compliance, implement internal controls, and create confidential avenues for individuals to report corruption internally. Especially in a context of asymmetrical regulation where only the supply side of the bribery of foreign public officials is within Canadian jurisdiction, a comprehensive approach to motivating compliance within Canadian firms is required to prevent them from engaging in corrupt business practices abroad.

This article has proposed the use of corporate-law directors' duties, securities law mandatory disclosure requirements, and enhanced communication between the regulator and those who are regulated to achieve this objective. Directors' duties to act with reasonable care and in the best interests of the corporation arguably already encompass a responsibility to address corruption risk. Developing this duty, either statutorily or through case law, would provide a powerful motivator for corporate boards to implement internal controls and ensure that the "tone at the top" does not condone corruption. The extension of existing securities mandatory-disclosure requirements to include a company's anti-corruption measures would provide further incentives for corporate directors and managers to address corruption risk. Moreover, when the bribery does take place, a company's past disclosure of its anti-corruption policies will support private enforcement efforts by providing a basis for securities class actions. Finally, the development of effective communication between regulators and Canadian companies will help managers and directors understand how to fulfill their obligations. Facilitating compliance and the development of best practices, rather than focusing exclusively on criminal prosecution, will help engage Canadian corporations in the international effort to prevent bribery of foreign public officials.

The use of Canadian corporate law directors' duties, securities mandatory disclosure requirements, and regulatory guidance to develop a more robust pyramid of anti-corruption legislation will benefit both Canadian corporations and the international community. These mechanisms should assist in reducing the Canadian supply of bribes as Canadian corporations are incentivized to develop stronger internal anti-corruption measures. In doing so, they will promote competitive markets, reinforce the rule of law, and encourage political and economic stability in the countries that Canadian multinational corporations serve.